

No. 16135

United States
Court of Appeals
For the Ninth Circuit

W. D. MacKAY,

Appellant,

vs.

AMERICAN POTASH & CHEMICAL CO., INC.,
a Corporation, and STAUFFER CHEMICAL
COMPANY, a Corporation,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

DEC 19 1958

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For the Ninth Circuit

W. D. MacKAY,

Appellant,

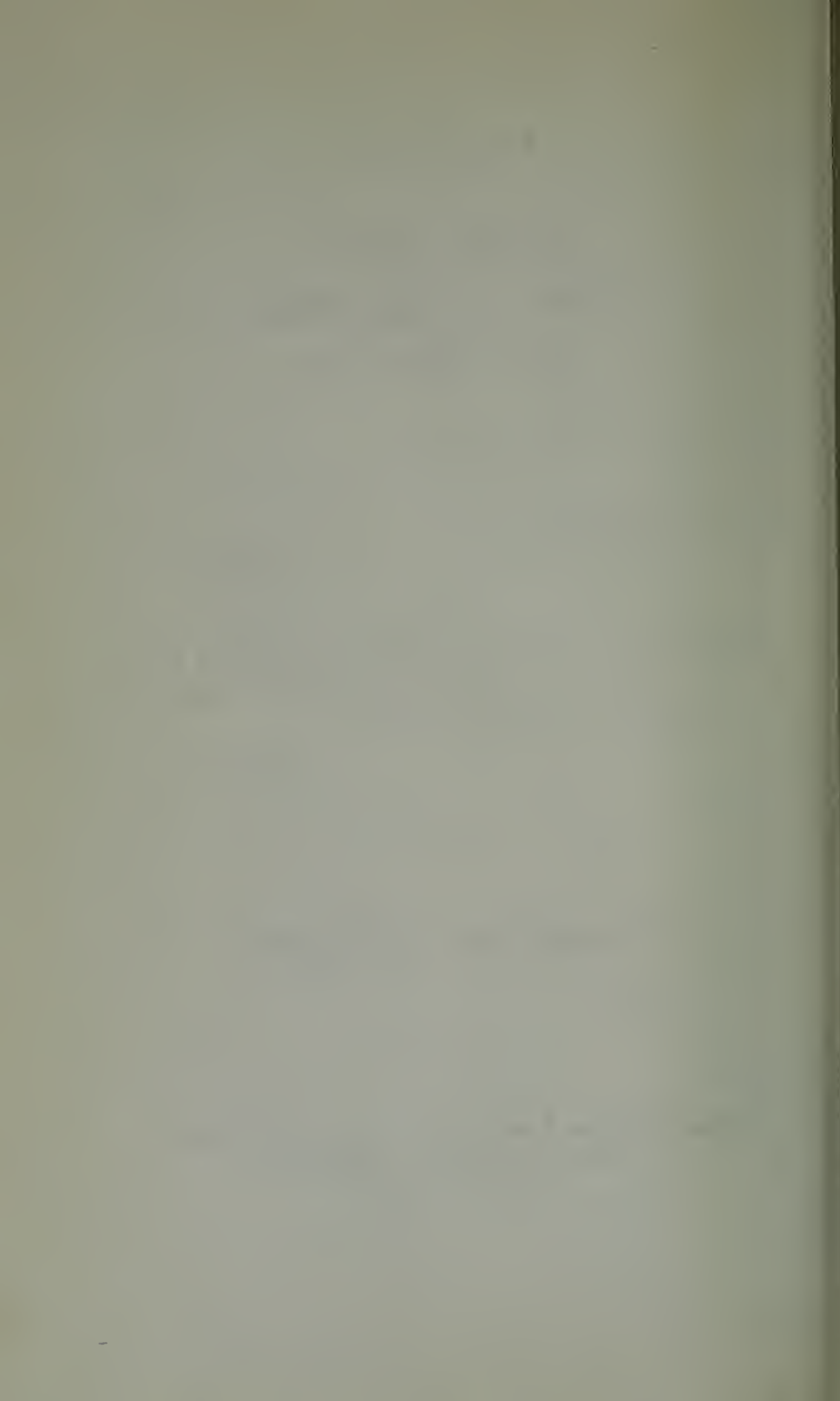
vs.

AMERICAN POTASH & CHEMICAL CO., INC.,
a Corporation, and STAUFFER CHEMICAL
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Transcript of Record

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Southern District of California
Central Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For Appellees, Stauffer Chemical Co.:

VINCENT H. O'DONNELL,
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San Francisco 4, California.

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In the United States District Court, Southern
District of California, Central Division

No. 933-57—HW

W. D. MacKAY,

Plaintiff,

vs.

AMERICAN POTASH & CHEMICAL CO., INC.,
a Corporation; WEST END CHEMICAL CO.,
INC., a Corporation; DOE I, DOE II, DOE
III, as Individuals; JOHN DOE & RICHARD
ROE, as Individuals and as Copartners; DOE
CORPORATION ONE,

Defendants.

PETITION FOR REMOVAL TO THE UNITED
STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

Comes now American Potash & Chemical Co.,
Inc., a corporation, a defendant in the above cause,
and files this, its Petition for Removal of this cause
from the Superior Court in and for the County of
Los Angeles, State of California, in which said cause
is now pending, to the District Court of the United
States in and for the Central Division of the South-
ern District of California, held in the City of Los
Angeles, in said District and State, and respectfully
shows to the Court the following:

1. That copies of all process, pleadings and
orders served upon petitioning defendant in this

cause to the date hereof in the above-referred to Superior Court, are attached hereto, marked Exhibit "A," and by reference are made a part of this Petition. That on July 24, 1957, the summons and complaint in the said Superior Court action were served in the City of Los Angeles and County of [2*] Los Angeles, State of California, on defendant and petitioner American Potash & Chemical Co., Inc., a Delaware corporation; that your Petitioner is one of the defendants named in this action, which is a civil action commenced in the Superior Court of the State of California, in and for the County of Los Angeles, No. 682788, entitled "W. D. MacKay, Plaintiff, vs. American Potash & Chemical Co., Inc., a Corporation; West End Chemical Co., Inc., a corporation; Doe I, Doe II, Doe III, as individuals; John Doe & Richard Roe, as individuals and as copartners; Doe Corporation One, Defendants," said complaint being entitled "Complaint (Common Counts, Declaratory Relief and Implied Contract)." That said action was commenced in said Superior Court on or about July 10, 1957. That your Petitioner has not yet appeared in answer to the summons and complaint so served upon it or filed any pleading in said action. That your Petitioner had not received from plaintiff, through service or otherwise, any copy of the summons or complaint in said action prior to July 24, 1957. That twenty days after receipt by your Petitioner of the said copy of the summons and complaint have not expired.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

2. That said Petitioner files its Petition for Removal of said cause in the aforesaid Superior Court in which it is now pending to the United States District Court, Southern District of California, Central Division, held in the City of Los Angeles, State of California.

3. That said action has been commenced as aforesaid, and at the time of said commencement and at all times since then has been and is now a suit of a civil nature at common law over which the District Courts of the United States have original jurisdiction by reason of diversities of the citizenship of the parties and the amount in controversy under the provisions of Title 28 U.S.C., § 1332, and is one which may be removed to this Court by your Petitioner pursuant to the provisions of Title 28 U.S.C., § 1441, in that it is a civil action wherein the matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and cost, and is between [3] citizens of different States.

4. That said action contains three alleged causes of action. That the first alleged cause of action of said complaint seeks reasonable compensation for alleged services allegedly performed for the defendants and each of them in the total amount of Two Hundred Fifty Thousand Dollars (\$250,000.00), as appears therefrom and from the prayer of said complaint. That the second alleged cause of action of said complaint seeks declaratory relief against the defendants and each of them with reference to the

same facts alleged in the first alleged cause of action, and relative to the same claimed sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) as appears from said second alleged cause of action. That the third alleged cause of action seeks the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) for alleged services rendered to the defendants and each of them on a common count, and based upon the same alleged facts as the first and second alleged causes of action as appears from the face of the said alleged third cause of action. That plaintiff's alleged causes of action are all based upon the same alleged facts as appears from the face of the complaint and the face of each alleged cause of action stated in said complaint.

5. That said complaint alleges that your Petitioner, American Potash & Chemical Co., Inc., is a Delaware corporation. That said allegation is true in that your Petitioner is a corporation organized and existing under and by virtue of the laws of the State of Delaware; that your Petitioner, said American Potash & Chemical Co., Inc., was at all times mentioned in said complaint, was on the date said complaint was filed, has been at all times since and is now a corporation organized and existing under and by virtue of the laws of the State of Delaware and a citizen and resident of that State.

6. Your Petitioner is informed and believes and therefore alleges that at the time of the commencement of this action and at all times since, the Plain-

tiff, W. D. MacKay, was and now is a [4] citizen and resident of the State of California.

7. That said complaint alleges that defendant West End Chemical Co., Inc., a corporation, is a corporation organized and existing under and by virtue of the laws of the State of California; said allegation is false and untrue in that said defendant West End Chemical Co., Inc., the true name of which was West End Chemical Company, was merged into Stauffer Chemical Company, a Delaware Corporation, as of on or about October 1, 1956, and that the public records of the State of California so disclose in that there is on file in the office of the Secretary of State, of the State of California, a signed counterpart of the agreement of merger filed by said defendant West End Chemical Company on or about October 1, 1956. That as of the date of said filing, the separate corporate existence of defendant West End Chemical Co., Inc., ceased. That as of the date of the filing of the complaint herein, the records of the Secretary of State of the State of California, show that there is no California corporation operating under a name containing the words "West End Chemical." That said defendant, West End Chemical Co., Inc., was named as a party to the aforesaid action by the plaintiff spuriously and without reasonable basis and in bad faith and for the fraudulent purpose of defeating removal.

8. That plaintiff has named as defendants certain fictitious defendants, being Doe I, Doe II, Doe

III, as individuals; John Doe & Richard Roe, as individuals and as copartners; Doe Corporation One. That prior to the institution of this action Petitioner caused the deposition of the plaintiff to be taken in a proceeding to perpetuate testimony concerning the matters complained of by plaintiff, plaintiff having previously filed proceedings to perpetuate the testimony of your Petitioner. In that deposition, plaintiff claimed that its only complaint on the alleged facts in this action was against your Petitioner, American Potash & Chemical Co., Inc. Petitioner is therefore informed and believes and on the basis of such information and belief [5] alleges that the above fictitious defendants and each of them, and the defendant, West End Chemical Co., Inc., are joined spuriously and without reasonable basis and in bad faith and for the fraudulent purpose of defeating removal. Plaintiff is further informed and believes, and on the basis of such information and belief alleges that as to each of said fictitious defendants, plaintiff has no actor in mind relative to the alleged causes of action and each of them; that each of said fictitious defendants, and the defendant West End Chemical Co., Inc., should be disregarded for purposes of this Petition. That insofar as petitioning defendant can ascertain, no other party defendant has been served in this action. That as appears from the affidavit attached hereto as Exhibit "B," there is as of the date of this Petition no return of service upon any other defendant on file in the Superior Court in and for the County of Los Angeles. Petitioner is

informed and believes and on the basis of such information and belief alleges that the joinder of the other defendants, named and fictitious, is solely for the purpose of defeating the jurisdiction of the District Courts of the United States.

9. That the facts hereinabove set forth in paragraph 7 of this Petition are further evidenced by the affidavit of George C. Ellis, attached hereto as Exhibit "C."

10. That the matter in dispute exceeds the sum of Three Thousand Dollars (\$3,000.00) exclusive of interest and cost, in that said action seeks alleged damages from defendants, and each of them, in the total amount of Two Hundred Fifty Thousand Dollars (\$250,000.00).

11. That petitioner American Potash & Chemical Co., Inc., a Delaware corporation, files herewith a Bond conditioned as required by law, with good and sufficient surety for paying all costs and disbursements incurred by reason of these removal proceedings, if this Court shall hold that the action is not removable or improperly removed [6] thereto, as provided by the statutes of the United States of America.

Your petitioner, therefore, prays for removal of the above-entitled cause from the Superior Court of the State of California, in and for the County of Los Angeles, to this Court.

Dated: August 2, 1957.

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
LESLIE G. TURNER,
MARTIN E. WHELAN, JR.,

By /s/ MARTIN E. WHELAN, JR.,
Attorneys for Defendant American Potash &
Chemical Co., Inc.

Duly verified. [7]

EXHIBIT A

In the Superior Court of the State of California
in and for the County of Los Angeles
No.

W. D. MacKAY,

Plaintiff,

vs.

AMERICAN POTASH & CHEMICAL CO., INC.,
a Corporation; WEST END CHEMICAL CO.,
INC., a Corporation; DOE I, DOE II, DOE
III, as Individuals; JOHN DOE & RICHARD
ROE, as Individuals and as Copartners; DOE
CORPORATION ONE,

Defendants.

COMPLAINT

(Common Counts, Declaratory Relief
and Implied Contract)

Now comes W. D. MacKay, and for a cause of
action against said defendants and each of them,
alleges:

I.

That the defendant, American Potash & Chemical Co., Inc., at all times herein mentioned, was, and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and authorized to do and engaged in doing business in the State of California.

II.

. That defendants West End Chemical Co., Inc., and Doe Corporation One, at all times herein mentioned, were, and now are, corporations duly organized and existing under and by virtue of the laws of the State of California. [10]

III.

That defendants Doe I, Doe II, Doe III, John Doe and Richard Roe, as individuals and as co-partners, and Doe Corporation One are sued herein by fictitious names and that plaintiff asks leave to amend and insert their proper names when they become known to plaintiff.

IV.

That on or about the fifteenth day of July, 1952, at Los Angeles, California, the plaintiff and the defendants mutually agreed that plaintiff should serve the defendants and each of them in securing natural gas service to the defendants' plants located in or about Trona, California, and that the plaintiff be compensated in a reasonable amount to be agreed upon by the plaintiff and defendants if the plaintiff secured said natural gas service.

V.

That thereafter on April 11, 1955, as a result of plaintiff's services and efforts, defendants made a contract with Pacific Gas & Electric Company for natural gas service. That thereafter on or about July 12, 1955, the California Public Utilities Commission approved such contract by Decision No. 51666. That thereafter, on or about October 1, 1955, Pacific Gas & Electric Company commenced delivering natural gas to defendants under such contract and the defendants and each of them ever since have received and used the benefits therefrom.

VI.

That thereafter, and before this action was commenced, the plaintiff demanded reasonable compensation for his services from the defendants and each of them.

VII.

That the defendants and each of them have not made payment, or [11] any part thereof, to plaintiff, and refuse to do so.

Wherefore, plaintiff prays as hereafter set forth.

And for a Second and Further Cause of Action,
Plaintiff Alleges:

I.

Incorporates herein and makes a part hereof by reference as though set out herein in full, paragraphs I, II, III, IV, and V of his First Cause of Action.

II.

That an actual controversy exists between the plaintiff and defendants and each of them relating to the legal rights and duties of the parties hereto and that a judicial inquiry is necessary to determine the legal rights of the parties. Plaintiff desires a declaration of the rights and duties of the parties hereto in connection with said controversy.

Wherefore, Plaintiff prays as hereafter set forth.

And for a Third and Further Cause of Action, Plaintiff Alleges:

I.

Incorporates herein and makes a part hereof by reference as though set out herein in full, paragraphs I, II, III, IV and V of his first cause of action. [12]

II.

That on October 1, 1955, in the County of Los Angeles, State of California, defendants and each of them were indebted to plaintiff in the sum of at least Two Hundred Fifty Thousand Dollars (\$250,000.00) for services rendered to the defendants and each of them.

III.

That no part of said sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) has been paid although plaintiff has demanded the same from the said defendants and each of them.

Wherefore, Plaintiff Prays:

1. That the Court render judgment against the defendants and each of them for the reasonable value of plaintiff's services, with interest at the rate of seven (7%) per cent from the 12th day of October, 1955;
2. That the Court adjudicate the controversy existing between the plaintiff and the defendants singularly and jointly;
3. That the Court render judgment against the defendants and each of them for Two Hundred Fifty Thousand Dollars (\$250,000.00) with interest at the rate of seven (7%) per cent from the 12th day of April, 1957; [13]
4. That plaintiff recover his costs of suit herein; and,
5. For such other and further relief as to the court may seem proper.

/s/ W. D. MacKAY.

Duly verified.

[Endorsed]: Filed August 2, 1957. [14]

[Title of District Court and Cause.]

NOTICE OF PETITION AND FILING
BOND FOR REMOVAL

To the Plaintiff, W. D. MacKay:

You Are Hereby Notified that on the 2nd day of August, 1957, a Petition and Bond for Removal in

the above-entitled cause, copies of which are annexed hereto, were filed in the United States District Court for the Southern District of California, Central Division.

Dated: August 5, 1957.

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
LESLIE G. TURNER,
MARTIN E. WHELAN, JR.,

By /s/ MARTIN E. WHELAN, JR.,
Attorneys for Defendant American Potash &
Chemical Co., Inc.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 5, 1957. [19]

[Title of District Court and Cause.]

ANSWER

The defendant American Potash & Chemical Co., Inc., a corporation, answering for itself alone to the alleged causes of action in the complaint herein, admits and denies and alleges as follows:

First Cause of Action

I.

Answering Paragraph I thereof, admits the same.

II.

Answering Paragraph II thereof, denies each and every allegation therein contained, and further specifically denies that defendant West End Chemical Co., Inc., was as of the date the complaint herein was filed or at any time subsequent thereto a corporation organized and existing under and by virtue of the laws [41] of the State of California. Defendant further specifically denies that plaintiff has any other corporation in mind as a defendant in this action, other than answering defendant.

III.

Answering Paragraph III thereof, admits that the defendants therein named are designated by fictitious names, and denies that plaintiff has any other person other than answering defendant in mind as a defendant in this action.

IV.

Answering Paragraph IV thereof, denies each and every allegation therein contained, and further specifically denies that answering defendant at any time entered into any agreement with the plaintiff as claimed by him in said Paragraph IV of the complaint, and further specifically denies that answering defendant promised plaintiff compensation in any amount whatsoever.

V.

Answering Paragraph V thereof, answering defendant admits that on April 11, 1955, it entered

into a contract with the Pacific Gas & Electric Company for natural gas service, that on or about July 12, 1955, such contract was approved by the California Public Utilities Commission, and that since on or about October 1, 1955, answering defendant has been receiving and using natural gas delivered by the Pacific Gas & Electric Company pursuant to the aforesaid contract. Other than as hereinbefore admitted, answering defendant denies each and all of the allegations of the aforesaid Paragraph V of the complaint.

VI.

Answering Paragraph VI thereof, answering defendant admits that plaintiff demanded compensation from answering defendant; answering defendant denies that plaintiff rendered any services to answering defendant. Other than hereinabove admitted or denied, answering defendant has no knowledge or information or belief [42] sufficient to enable it to answer the allegations of said Paragraph VI, and on that ground denies each and all of said allegations except as hereinabove admitted or denied.

VII.

Answering Paragraph VII thereof, defendant admits that it has made no payment to plaintiff, and alleges that it has no obligation of any type or manner to make payment to plaintiff in any sum whatsoever. Answering defendant has no knowledge or information or belief as to the allegations of said Paragraph VII insofar as other "defendants" are

concerned, and on that ground denies the allegations thereof as to said defendants and each of them.

Second Cause of Action

I.

Answering Paragraph I thereof, answering defendant incorporates herein by reference its admissions, denials, and allegations contained in Paragraphs I, II, III, IV and V of the answer herein to the First Cause of Action.

II.

Answering Paragraph II thereof, admits that there is a controversy between plaintiff and answering defendant, but denies that any judicial inquiry is necessary, and further denies that plaintiff has any right to declaratory relief.

Third Cause of Action

I.

Answering Paragraph I thereof, answering defendant incorporates herein by reference its admissions, denials, and allegations contained in Paragraphs I, II, III, IV and V of the answer herein to the First Cause of Action.

II.

Answering Paragraph II thereof, denies each and every allegation therein contained, and further denies that answering defendant was at any time or

is now indebted to plaintiff in any sum [43] whatsoever.

III.

Answering Paragraph III thereof, it admits that it has paid no sum to plaintiff and alleges that there is no sum either due or owing from answering defendant to plaintiff. Other than hereinabove admitted or alleged, answering defendant has no knowledge or information or belief sufficient to enable it to answer the allegations of said Paragraph III, and on that ground denies them.

For further and separate defenses to each of plaintiff's alleged causes of action, answering defendant alleges as follows:

First Affirmative Defense

I.

That any action is barred and cannot be maintained by reason of the failure of plaintiff to allege that he had a Business Opportunities Broker's License as required by California Business and Professions Code Sections 10,250, et seq.

Second Affirmative Defense

I.

That any action is barred and cannot be maintained by reason of the failure of plaintiff to allege that he had a Mineral, Oil and Gas Broker's License as required by California Business and Professions Code, Sections 10,500, et seq.

Third Affirmative Defense

I.

Answering defendant is informed and believes and on the basis of such information and belief alleges that at no time mentioned in the complaint did plaintiff have a Business Opportunities Broker's License as required under California Business and Professions Code, Sections 10,250, et seq., and that accordingly no action can be maintained; that if there was any agreement such as claimed by plaintiff, which answering defendant denies, it would be illegal. [44]

Fourth Affirmative Defense

I.

Answering defendant is informed and believes and on the basis of such information and belief alleges that at no time mentioned in the complaint did plaintiff have a Mineral, Oil and Gas Broker's License as required under California Business and Professions Code, Sections 10,500, et seq., and that accordingly no action can be maintained; that if there was any agreement such as claimed by plaintiff, which answering defendant denies, it would be illegal.

Fifth Affirmative Defense

I.

That if plaintiff was employed by defendant, which defendant denies, no action can be main-

tained by plaintiff for want of an agreement in writing as required pursuant to California Civil Code, Section 1624(a), and California Code of Civil Procedure, Section 1973(a), in conjunction with California Civil Code, Section 2309. That the agreement with the Pacific Gas & Electric Company, set forth in Paragraph V of plaintiff's complaint called for the sale of personal property of a value in excess of Five Hundred Dollars (\$500.00).

Sixth Affirmative Defense

I.

That any action is barred by reason of the provisions of Section 339, subdivision (1) of the California Code of Civil Procedure.

Wherefore, answering defendant prays that plaintiff take nothing by reason of its complaint, that defendant be awarded [45] costs of suit herein, and such other and further relief as the Court may deem proper.

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
LESLIE G. TURNER,
MARTIN E. WHELAN, JR.,

By /s/ MARTIN E. WHELAN, JR.,
Attorneys for Defendant American Potash &
Chemical Co., Inc., a Corporation.

To the Plaintiff, W. D. MacKay, and to the Clerk
of the Above-Entitled Court:

You and Each of You Will Please Take Notice
that defendant American Potash & Chemical Co.,
Inc., demands a trial by jury in the above-entitled
action.

Dated: August 7, 1957.

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
LESLIE G. TURNER,
MARTIN E. WHELAN, JR.,

By /s/ MARTIN E. WHELAN, JR.,
Attorneys for Defendant American Potash &
Chemical Co., Inc., a Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 7, 1957. [46]

[Title of District Court and Cause.]

ANSWER

Answering the plaintiff's complaint herein the de-
fendant, Stauffer Chemical Company, a corporation,
sued herein as West End Chemical Co., Inc., ad-
mits, denies and alleges as follows:

First Cause of Action

I.

Answering Paragraph I admits the allegations
thereof.

II.

Answering Paragraph II thereof, denies each and every allegation therein contained, and further specifically denies that defendant West End Chemical Co., Inc., was as of the date the complaint herein was filed or at any time subsequent thereto a corporation organized and existing under and by virtue of the [48] laws of the State of California. Alleges that on October 1, 1956, West End Chemical Company, sued herein as West End Chemical Co., Inc., merged into and became a part of Stauffer Chemical Company, and that on said date West End Chemical Company ceased to exist as a result of said merger. The said Stauffer Chemical Company is and at all times material hereto, has been a corporation organized and existing under the laws of the State of Delaware and is authorized to do business in the State of California. Defendant further specifically denies that plaintiff has any other corporation in mind as a defendant in this action, other than the answering defendant and defendant, American Potash & Chemical Co., Inc.

III.

Answering Paragraph III thereof, admits that the defendants therein named are designated by fictitious names, and denies that plaintiff has any other person other than answering defendant and American Potash & Chemical Co., Inc., in mind as a defendant in this action.

IV.

Answering Paragraph IV thereof, denies each

and every allegation therein contained, and further specifically denies that answering defendant at any time entered into any agreement with the plaintiff as claimed by him in said Paragraph IV of the complaint, and further specifically denies that answering defendant promised plaintiff compensation in any amount whatsoever.

V.

Answering Paragraph V thereof, answering defendant admits that on April 11, 1955, it entered into a contract with the Pacific Gas & Electric Company for natural gas service, that on or about July 12, 1955, such contract was approved by the California Public Utilities Commission, and that since on or about November 16, 1955, answering defendant has been receiving and using [49] natural gas delivered by the Pacific Gas & Electric Company pursuant to the aforesaid contract. Other than as hereinbefore admitted, answering defendant denies each and all of the allegations of the aforesaid Paragraph V of the complaint.

VI.

Denies that plaintiff rendered any services to or demanded compensation from answering defendant. Other than hereinabove admitted or denied, answering defendant has no knowledge or information or belief sufficient to enable it to answer the allegations of said Paragraph VI, and on that ground denies each and all of said allegations except as hereinabove admitted or denied.

VII.

Answering Paragraph VII thereof, defendant admits that it has made no payment to plaintiff, and alleges that it has no obligation of any type or manner to make payment to plaintiff in any sum whatsoever. Answering defendant has no knowledge or information or belief as to the allegations of said Paragraph VII insofar as other "defendants" are concerned, and on that ground denies the allegations thereof as to said defendants and each of them.

Second Cause of Action

I.

Answering Paragraph I thereof, answering defendant incorporates herein by reference its admissions, denials, and allegations contained in Paragraphs I, II, III, IV and V of the answer herein to the First Cause of Action.

II.

Answering Paragraph II thereof, admits that there is a controversy between plaintiff and answering defendant, but denies that any judicial inquiry is necessary, and further denies that plaintiff has any right to declaratory relief. [50]

Third Cause of Action

I.

Answering Paragraph I thereof, answering defendant incorporates herein by reference its admis-

sions, denials, and allegations contained in Paragraphs I, II, III, IV and V of the answer herein to the First Cause of Action.

II.

Answering Paragraph II thereof, denies each and every allegation therein contained, and further denies that answering defendant was at any time or is now indebted to plaintiff in any sum whatsoever.

III.

Answering Paragraph III thereof, it admits that it has paid no sum to plaintiff and alleges that there is no sum either due or owing from answering defendant to plaintiff. Other than hereinabove admitted or alleged, answering defendant has no knowledge or information or belief sufficient to enable it to answer the allegations of said Paragraph III, and on that ground denies them.

For further and separate defenses to each of plaintiff's alleged causes of action, answering defendant alleges as follows:

First Affirmative Defense

I.

That any action is barred and cannot be maintained by reason of the failure of plaintiff to allege that he had a Business Opportunities Broker's License as required by California Business and Professions Code, Sections 10,250, et seq.

Second Affirmative Defense

I.

That any action is barred and cannot be maintained by reason of the failure of plaintiff to allege that he had a Mineral, Oil and Gas Broker's License as required by California [51] Business and Professions Code, Sections 10,500, et seq.

Third Affirmative Defense

I.

Answering defendant is informed and believes and on the basis of such information and belief alleges that at no time mentioned in the complaint did plaintiff have a Business Opportunities Broker's License as required under California Business and Professions Code, Sections 10,250, et seq., and that accordingly no action can be maintained; that if there was any agreement such as claimed by plaintiff, which answering defendant denies, it would be illegal.

Fourth Affirmative Defense

I.

Answering defendant is informed and believes and on the basis of such information and belief alleges that at no time mentioned in the complaint did plaintiff have a Mineral, Oil and Gas Broker's License as required under California Business and Professions Code, Sections 10,500, et seq., and that accordingly no action can be maintained; that if

there was any agreement such as claimed by plaintiff, which answering defendant denies, it would be illegal.

Fifth Affirmative Defense

I.

That if plaintiff was employed by defendant, which defendant denies, no action can be maintained by plaintiff for want of an agreement in writing as required pursuant to California Civil Code, Section 1624(a), and California Code of Civil Procedure, Section 1973(a), in conjunction with California Civil Code, Section 2309. That the agreement with the Pacific Gas & Electric Company, set forth in Paragraph V of plaintiff's complaint called for the sale of personal property of a value in excess of Five Hundred Dollars (\$500.00). [52]

Sixth Affirmative Defense

I.

That any action is barred by reason of the provisions of Section 339, subdivision (1) of the California Code of Civil Procedure.

Wherefore, answering defendant prays that plaintiff take nothing by reason of its complaint, that defendant be awarded costs of suit herein, and such other and further relief as the Court may deem proper.

VINCENT H. O'DONNELL,
FREDRIK S. WAISS,

By /s/ FREDRIK S. WAISS,
Attorneys for Defendant Stauffer Chemical Com-
pany, a Corporation, Sued Herein as West End
Chemical Co., Inc.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 26, 1957. [53]

[Title of District Court and Cause.]

MINUTES OF THE COURT, OCT. 7, 1957

Present: Hon. Harry C. Westover, District Judge.

Counsel for Plaintiff: G. H. Gottlieb.

Plaintiff W. D. MacKay present in pro.
per.

Counsel for Defendant American Potash:
Leslie G. Turner.

Counsel for Defendant West End Chemi-
cal: Fredrick S. Waiss.

Proceedings:

For pretrial conference (pursuant to notice).

It Is Ordered that cause is continued to Nov. 18,
1957, 3:00 p.m., for pretrial conference.

JOHN A. CHILDRESS,
Clerk;

By /s/ MARY O. SMITH,
Deputy Clerk. [56]

[Title of District Court and Cause.]

MINUTES OF THE COURT, NOV. 18, 1957

Present: Hon. Harry C. Westover, District Judge.
Counsel for Plaintiff: G. H. Gottlieb.
Counsel for Defendant American Potash
& Chemical Co.: Martin E. Whelan, Jr.
Counsel for Defendant West End Chem.:
Fredrick S. Waiss.

Proceedings:

For pretrial conference.

Statements are made by Court and counsel.

It Is Ordered that cause is continued to Dec. 16,
1957, 3:00 p.m., for further pretrial conference.

JOHN A. CHILDRESS,
Clerk;

By /s/ MARY O. SMITH,
Deputy Clerk. [57]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

The above-named plaintiff hereby substitutes Gerald H. Gottlieb as his attorney of record in place of himself, W. D. MacKay in propria persona.

Dated: December 16, 1957.

/s/ W. D. MacKAY.

I hereby accept the above substitution.

Dated: December 16, 1957.

/s/ GERALD H. GOTTLIEB.

[Endorsed]: Filed December 16, 1957. [69]

[Title of District Court and Cause.]

DEFENDANTS' INTERROGATORIES

Defendants, American Potash & Chemical Co., Inc., and Stauffer Chemical Company, pursuant to Rule 33 of the Federal Rules of Civil Procedure, and pursuant to local Rule 4(e), require plaintiff, W. D. MacKay, to fully answer each and every of the interrogatories hereinafter set forth and within the period of time specified in Federal Rule 33.

Interrogatory No. 1:

With what officers, agents and employees, if any, of Pacific Gas & Electric Company have you at any time on or before April 11, 1955, been in personal or telephonic conference with or directed any other type of communication to (whether by letter, telegram or any other means), or received any other type of [70] communication from (whether by letter, telegram or any other means), concerning or in any way related to the furnishing of natural gas service by Pacific Gas & Electric Company to either the general area of and around Trona, California, or to any plant of American Potash & Chemical

Co., Inc., in or around that area, or to any plant of the then West End Chemical Company in or around that area, or to any combination of the aforementioned. As to each such communication, state, after the name of the particular officer, agent, or employee of Pacific Gas & Electric Company named by you:

(a) The date of each conference with, and each other communication from, or directed to that person;

(b) The type of communication, whether with you and that person present together, by telephone, letter, telegram, or other means;

(c) As to each communication other than where you and the other person were present together, who wrote or otherwise originated the communication;

(d) What was said or written by either you or that other person or both in each such communication;

(e) Whether you have in your possession or under your control either the written communication involved, or any written memoranda of the oral communication involved.

Interrogatory No. 2:

With what officers, agents and employees, if any, of Pacific Gas & Electric Company have you at any time after April 11, 1955, and to and including October 1, 1955, been in personal or telephonic conference with or directed any other type of com-

munication to (whether by letter, telegram or any other means), or received any other type of communication from (whether by letter, telegram or any other means), concerning or in any way related to the furnishing of natural gas service by Pacific Gas & Electric Company to either the general area of and around Trona, California, or to any plant of [71] American Potash & Chemical Co., Inc., in or around that area, or to any plant of the then West End Chemical Company in or around that area, or to any combination of the aforementioned. As to each such communication, state, after the name of the particular officer, agent, or employee of Pacific Gas & Electric Company named by you:

(a) The date of each conference with, and each other communication from, or directed to that person;

(b) The type of communication, whether with you and that person present together, by telephone, letter, telegram, or other means;

(c) As to each communication other than where you and the other person were present together, who wrote or otherwise originated the communication;

(d) What was said or written by either you or that other person or both in each such communication;

(e) Whether you have in your possession or under your control either the written communica-

tion involved, or any written memoranda of the oral communication involved.

Interrogatory No. 3:

To your personal knowledge, what individuals, if any, including yourself, other than individuals now known by you to have then been officers, or full-time regular employees of either (i) American Potash & Chemical Co., Inc., (ii) the then West End Chemical Company, or (iii) Pacific Gas & Electric Company, had anything to do with interesting Pacific Gas & Electric Company in furnishing natural gas service either to the general area of and around Trona, California, or to the plant in that area of American Potash & Chemical Co., Inc., or to the plant in that area of the then West End Chemical Company, or more than one of the foregoing. As to each such individual, and next to his or her name, state:

(a) What you know that individual did in so interesting Pacific Gas & Electric Company; [72]

(b) To the extent known, the approximate date or dates on which such was done by each such individual;

(c) To the extent that you have no personal knowledge of what each such individual did in so interesting Pacific Gas & Electric Company, what you believe them to have done based on information of any type which you now have;

(d) To the extent that you do not know of your own knowledge the approximate date or dates on which such was done by any such individual, state the approximate date or dates on which you believe such was done based upon any information which you now have;

(e) If there are any affirmative responses to subparts (c) and (d), upon what information are the affirmative responses to subparts (c) and (d) based, and from whom was that information obtained, and do you have in your possession or under your control any written documents or other records evidencing such information?

Interrogatory No. 4:

What individuals, if any, including yourself, other than individuals now known by you to have then been officers or full time regular employees of either (i) American Potash & Chemical Co., Inc., (ii) the then West End Chemical Company, or (iii) Pacific Gas & Electric Company, do you now have any information other than personal knowledge upon which to assert that those individuals had anything to do with interesting Pacific Gas & Electric Company in furnishing natural gas service either to the area of and around Trona, California, or to the plant in that area of American Potash & Chemical Co., Inc., or to the plant in that area of the then West End Chemical Company, or more than one of the foregoing. As to each such individual, and next to his or her name, state:

(a) What that information indicates as to what the particular individual did in so interesting Pacific Gas & Electric Company;

(b) What that information indicates as to the approximate [73] date or dates on which such was done by each such individual;

(c) From whom the information was obtained;

(d) Whether you have in your possession or under your control any written documents or other records evidencing such information.

Interrogatory No. 5:

With what members, agents and employees of the California Public Utilities Commission have you at any time on or before July 12, 1955, been in personal or telephonic conference with or directed any other type of communication to (whether by letter, telegram or any other means), or received any other type of communication from (whether by letter, telegram or any other means), concerning or in any way related to the furnishing of natural gas service by Pacific Gas & Electric Company to either the general area of and around Trona, California, or to any plant of American Potash & Chemical Co., Inc., in or around that area, or to any plant of the then West End Chemical Company in or around that area, or to any combination of the aforementioned. As to each such communication, state, after the name of the particular member, agent, or employee

of the California Public Utilities Commission named by you:

(a) The date of each conference with, and each other communication from, or directed to that person;

(b) The type of communication, whether with you and that person present together, by telephone, letter, telegram, or other means;

(c) As to each communication other than where you and the other person were present together, who wrote or otherwise originated the communication;

(d) What was said or written by either you or that other person or both in each such communication;

(e) Whether you have in your possession or under your [74] control either the written communication involved, or any written memoranda of the oral communication involved.

Interrogatory No. 6:

Did you in any way participate in the hearings of the Public Utilities Commission of the State of California held in connection with the request for approval of the contracts entered into on or about April 11, 1955, between American Potash & Chemical Co., Inc., and Pacific Gas & Electric Company, and West End Chemical Company and Pacific Gas & Electric Company? If so, state the nature of your

participation and exactly what you did in those hearings.

VINCENT H. O'DONNELL,
FREDRIK S. WAISS,

By /s/ MARTIN E. WHELAN, JR.,
Attorneys for Defendant Stauffer Chemical Com-
pany, a Corporation.

GIBSON, DUNN &
CRUTCHER,
WILLIAM F. SPALDING,
LESLIE G. TURNER,
MARTIN E. WHELAN, JR.,

By /s/ MARTIN E. WHELAN, JR.,
Attorneys for Defendant American Potash & Chem-
ical Co., Inc., a Corporation.

Affidavit of service by mail attached.

[Endorsed]: Filed December 20, 1957. [75]

[Title of District Court and Cause.]

MINUTES OF THE COURT, DEC. 16, 1957

Present: Hon. Harry C. Westover, District Judge;
Counsel for Plaintiff: Gerald H. Gottlieb.
Counsel for Defendant American Potash
& Chem. Co.: Martin E. Whelan, Jr.
Counsel for Defendant West End Chemi-
cal: no appearance (F. S. Waiss).

Proceedings:

For (1) hearing motion of defendant American Potash & Chemical (filed 12/6/57), to dismiss; and (2) further pretrial.

Attorney Whelan makes a statement that Attorney Waiss is engaged in court in San Francisco.

Attorney Gottlieb argues to the Court.

Court makes a statement and orders cause continued to Jan. 13, 1958, 2 p.m., for hearing said motion of defendant American Potash & Chemical (filed 12/6/57), to dismiss, and for further pretrial.

JOHN A. CHILDRESS,
Clerk;

By /s/ MARY O. SMITH,
Deputy Clerk. [77]

[Title of District Court and Cause.]

AFFIDAVIT OF J. H. GUMZ IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

State of California,
City and County of San Francisco—ss.

J. H. Gumz, being duly sworn, deposes and states:

I am now and have been since 1941 the manager of commercial and industrial sales of the Pacific Gas & Electric Company. The duties of the position I hold include the negotiation of contracts for the

supplying of natural gas service to industrial users such as American Potash & Chemical Co., Inc., and West End Chemical Company. Inquiries as to the availability of natural gas service from such concerns would in the normal handling of such matters in the Pacific Gas & Electric Company [86] be referred to me.

The files of Pacific Gas & Electric Company reveal that the first inquiries by anyone on behalf of either American Potash & Chemical Co., Inc., or West End Chemical Company as to the availability of gas service to the plants of either company in the Searles Lake (Trona, California) area was in the form of a letter dated November 20, 1948, from R. B. Coons, Vice President of American Potash & Chemical Co., Inc., to N. R. Sutherland, then Vice President of Pacific Gas & Electric Company. A photostatic copy of that letter is attached to this affidavit and made a part hereof.

Not until the year 1954 did the Pacific Gas & Electric Company have a sufficient supply of natural gas in its transmission pipeline running near the Searles Lake plants of American Potash & Chemical Co., Inc., and West End Chemical Company to consider service to users in the Trona, California, area. In July, 1954, acting on instructions of the management of Pacific Gas & Electric Company, I instituted contract discussions with both American Potash & Chemical Co., Inc., and West End Chemical Company, and continued negotiation of such contracts until natural gas supply con-

tracts were entered into with each of those companies on April 11, 1955. Negotiations for the supplying of natural gas to American Potash & Chemical Co., Inc., and West End Chemical Company were carried on by affiant on behalf of Pacific Gas & Electric Company solely with R. B. Coons on behalf of American Potash & Chemical Co., Inc., and George C. Ellis on behalf of West End Chemical Company. At no time during the negotiation of the aforesaid contracts or prior thereto was affiant approached by W. D. MacKay concerning natural gas service for American Potash & Chemical Co., Inc., West End Chemical Company or anyone else in the Trona, California, area. Affiant was never advised by anyone in the organization of Pacific Gas [87] & Electric Company, either orally or by written communication, that any inquiry had ever been made by W. D. MacKay or anyone on his behalf concerning natural gas service for the Trona area in general or for American Potash & Chemical Co., Inc., or for West End Chemical Company. Neither affiant nor, to the best of affiant's information and belief, anyone else in the employ of Pacific Gas & Electric Company has at any time prior to the commencement of natural gas service to American Potash & Chemical Co., Inc., and West End Chemical Company in October, 1955, discussed or communicated with W. D. MacKay concerning the supplying of natural gas to American Potash & Chemical Co., Inc., West End Chemical Company or to anyone else in the Trona, California, area. At no time during the negotiations which led to the execu-

tion of the aforesaid natural gas contract by the Pacific Gas & Electric Company, American Potash & Chemical Co., Inc., and West End Chemical Company did W. D. MacKay participate in any way.

To the best of affiant's knowledge and belief no services or efforts of W. D. MacKay played any role in directly or indirectly inducing Pacific Gas & Electric Company to offer gas service to American Potash & Chemical Co., Inc., or West End Chemical Company or to any other user in the Trona, California, area or in the negotiation of the natural gas supply contracts referred to above or the approval of said contracts by the Public Utilities Commission of the State of California. Affiant has no knowledge of any services or efforts of any sort by W. D. MacKay on behalf of either American Potash & Chemical Co., Inc., or West End Chemical Company.

To the best of my knowledge and belief no one outside of the Pacific Gas & Electric Company other than R. B. Coons on behalf of American Potash & Chemical Co., Inc., and George C. Ellis on behalf of West End Chemical Company has played any role in the obtaining of natural gas service to the plants of American [88] Potash & Chemical Co., Inc., and West End Chemical Company located in or about Trona, California.

/s/ J. H. GUMZ.

Subscribed and sworn to before me this 27th day of December, 1957.

[Seal] /s/ EILEEN GRIFFIN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 16, 1959. [89]

American Potash & Chemical Corporation
3030 West Sixth Street
Los Angeles 54, California

March 14, 1949.

Mr. N. R. Sutherland, Vice President,
Pacific Gas & Electric Company,
245 Market Street,
San Francisco, California.

Dear Mr. Sutherland:

The announcement in the Press of the Federal Power Commission's authorization for new pipeline facilities from Texas prompts me to recall to your attention the conversation we had in your office on June 18, 1948, at which Mr. Black and Mr. Colefax, President of our Company, were present.

As I recall our discussion, you indicated that you would be glad to talk the matter over further with us when you were in a position to do so. As we stated at that time, fuel is our second largest cost, being next to labor, and we are anxious to keep in

active touch with every possibility to improve our situation in this respect.

I would very much appreciate your giving my personal regards to Jim Black, and of course Mr. Colefax joins me in best regards to yourself.

Sincerely,

/s/ ROBERT B. COONS,
Vice President.

RBC:AH

[Stamped]: Received March 15, 1949—N. R. Sutherland.

[Endorsed]: Filed January 3, 1958. [90]

[Title of District Court and Cause.]

AFFIDAVIT OF W. M. JACOBS IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

State of California,
City and County of San Francisco—ss.

W. M. Jacobs, being first duly sworn, deposes and states:

Prior to October 1, 1956, I was an employee of Southern California Gas Company, with its main office situated in Los Angeles, California, continuously for a period of approximately 26 years. For approximately the last 5 years of that employment I was a Vice President of the company. One of my duties as such Vice President was the supervision

of studies of the economic feasibility of major extensions of natural gas pipelines to new [91] areas such as that in the vicinity of Trona, California. Southern California Gas Company had in fact made studies of the feasibility of serving the Trona, California, area in 1931, 1950 and 1951.

Sometime in the year 1952 I received a request from Mr. W. D. MacKay for a meeting for the purpose of discussing an extension of natural gas service to the United States Navy's establishment at Ridgecrest, California, and I did so meet in my office in September, 1952, with Mr. MacKay and a Mr. Minster representing the Navy. The fuel requirements of American Potash & Chemical Co., Inc., and West End Chemical Company at their Searles Lake plants was discussed at the meeting, since these plants were potential users of natural gas in that area. At the conclusion of the meeting, we informed Mr. MacKay and Mr. Minster that we would re-examine the possibility of such an extension. Following such re-examination we determined that the extension was not a feasible one for Southern California Gas Company and I believe we so informed Mr. MacKay. Following this notification we had no additional discussions with either Mr. MacKay or Mr. Minster.

At no time did I ever contact Pacific Gas & Electric Company or any of its officers, directors, agents or employees in an attempt to interest that company in furnishing natural gas service to the plant of American Potash & Chemical Co., Inc., in that

area or to the plant of West End Chemical Company in that area, nor to my knowledge did anyone connected with Southern California Gas Company ever do so. At no time did I ever have any conversations or communications of any type with Pacific Gas & Electric Company, or any of its officers, directors, agents or employees in which I either discussed or urged the furnishing of such natural gas service by Pacific Gas & Electric Company, nor to my knowledge did anyone connected with [92] Southern California Gas Company ever do either of these. At no time in any discussion with Mr. MacKay did I ever intimate to that individual that I or anyone else connected with Southern California Gas Company would in any way intercede with Pacific Gas & Electric Company in furnishing natural gas to the area in and around Trona, California, or to the plants of either American Potash & Chemical Co., Inc., or West End Chemical Company.

/s/ W. M. JACOBS.

Subscribed and sworn to before me this 27th day of December, 1957.

[Seal] /s/ EILEEN GRIFFIN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 16, 1959.

[Endorsed]: Filed January 3, 1958. [93]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE C. ELLIS IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

State of California,
County of Alameda—ss.

George C. Ellis, being first duly sworn, deposes and states:

I was President of West End Chemical Company continuously from April 26, 1943, to the date of its merger with Stauffer Chemical Company on October 1, 1956. I am now, and have been since the date of said merger, a Vice President of Stauffer Chemical Company in charge of the West End Chemical Company Division. [94]

West End Chemical Company for many years has been interested in obtaining natural gas service at its Searles Lake plant. During July, 1955, the Pacific Gas & Electric Company instituted discussions with it which led to the execution of a natural gas supply contract for that plant on April 11, 1955.

All of the negotiations for the obtaining of natural gas service to our Searles Lake plant were carried on by affiant or by H. D. Hellmers, then a Vice President of West End Chemical Company. William D. MacKay was at no time authorized to and he did not represent West End Chemical Company in any capacity.

Affiant is informed and believes and therefore states that William D. MacKay did not in any way assist in the obtaining of natural gas service to the plants of West End Chemical Company, American Potash & Chemical Co., Inc., or to any other user in the vicinity of Trona, California.

/s/ GEORGE C. ELLIS.

Subscribed and sworn to before me, this 30th day of December, 1957.

[Seal] /s/ ELEANOR CAMP THOMPSON,
Notary Public in and for the County of Alameda,
State of California.

My Commission expires May 21, 1960.

[Endorsed]: Filed January 3, 1958. [95]

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT B. COONS IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

State of California,
County of Los Angeles—ss.

Robert B. Coons, being first duly sworn, deposes and says:

That he is Vice President of American Potash & Chemical Corporation and has been for the past nine years. That among his duties at American

Potash & Chemical Corporation, he is in charge of and solely responsible for negotiations for gas service or any installations for American Potash & Chemical Corporation in the general Southern California area and, specifically, at the Trona, California, plant of that company. [96]

That in the Fall of 1952 affiant was contacted by plaintiff who led affiant to believe that he was a representative of or in some way connected with one Mr. Minister, a civilian engineer for the United States Navy. That plaintiff discussed generally the question of gas service for the general Trona, California, area and suggested the possibility of mutual advantage in working together for the purpose of obtaining gas service in the Trona, California, area and indicated that he represented certain public interests. Thereafter, in November or December of 1952, affiant had a telephone conversation with plaintiff at which time plaintiff requested that affiant employ plaintiff to represent American Potash & Chemical Corporation in securing natural gas service for that company at its plant in Trona, California. That affiant had become somewhat alarmed by reports he had received that plaintiff had, prior to said telephone conversation, made representations to others that he represented American Potash & Chemical Corporation and, therefore, in the telephone conversation above referred to, affiant called his assistant, Mr. Hefler, so that Mr. Tefler could overhear affiant's statements to plaintiff to the effect that American Potash &

Chemical Corporation did not desire to employ plaintiff. That thereafter affiant had no conversations with plaintiff until June or July of 1955.

That as early as 1948 affiant had contacted Pacific Gas & Electric Company for the purpose of prevailing on that company to furnish gas service to the Trona, California, area. That affiant has long been a close personal friend of Mr. James Black, then President of Pacific Gas & Electric Company, and Mr. Norman Southerland, the Executive Vice President of Pacific Gas & Electric Company and presently President of Pacific Gas & Electric Company, and had periodically, up until the Fall of 1954, had occasion to discuss the possibility of obtaining gas in the Trona area with these gentlemen.

That in the Summer of 1954, affiant commenced negotiations with one J. H. Gumz, Manager of Commercial and Industrial Sales of [97] Pacific Gas & Electric Company for the purpose of supplying natural gas service to the Trona, California, area. The said negotiations resulted in a contract between American Potash & Chemical Corporation and Pacific Gas & Electric Company for said gas service; the contract being finalized on April 11, 1955. That at no time was plaintiff authorized to negotiate with Pacific Gas & Electric Company on behalf of American Potash & Chemical Corporation for any purpose whatsoever and affiant knows of no occasion when plaintiff had any discussions with representatives of Pacific Gas & Electric Company for the purpose of supplying gas service to the

Trona, California, area. All negotiations for the supply of said gas service by Pacific Gas & Electric Company were conducted by affiant and/or his assistant, Mr. Hefler.

/s/ ROBERT B. COONS.

Subscribed and sworn to before me this 2nd day of January, 1958.

[Seal] /s/ HAROLD O. COVERT,
Notary Public in and for Said
County and State.

My Commission expires January 7, 1961.

[Endorsed]: Filed January 3, 1958. [98]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM F. SPALDING IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

State of California,
County of Los Angeles—ss.

William F. Spalding, being first duly sworn, deposes and says:

That he is an attorney duly licensed to practice law in the State of California and is a member of the firm of Gibson, Dunn & Crutcher, attorneys for defendant American Potash & Chemical Co., Inc., a corporation.

That on November 7, 1956, the deposition of William D. MacKay, the plaintiff in the within action, was taken by affiant pursuant to the Application of American Potash & Chemical Corporation [99] to Perpetuate Testimony, a proceeding in the Superior Court of the State of California in and for the County of Los Angeles, Los Angeles Superior Court, No. 668414.

That the application to perpetuate testimony above referred to and the depositions taken pursuant thereto were all as a result of a claim made by William D. MacKay, which claim was substantially reduced to the complaint presently on file in the within action. That at the time and place of said deposition the following questions were put to the said William D. MacKay by affiant and the following answers were given, under oath, by the said William D. MacKay:

“Q. Because Mr. Jacobs said he didn’t think you would have any trouble with PG&E you concluded the thing was all set up?

A. That is if a proper deal could be made, that the PG&E would want the business.

Q. You concluded that from the statement that Mr. Jacobs made to you?

A. Yes, that was my conclusion.

Q. Is that all the conversation with Mr. Coons?

A. That was all the conversation, so I told him, ‘All right,’ or something like that, and that he had my address.

So it was only a very short time after that that I learned that the PG&E were on the ground and making surveys and one thing or another on that deal. Very shortly after that talk—and there's one thing I might tell you here that I overlooked. You asked me sometime or other along the line whether I had talked with any PG&E man. I didn't as far as any of the officials were concerned, but I called on the PG&E man at Edwards Air Force Base prior to this.

Q. Prior to what? [100]

A. When I was up in that area.

Q. Prior to what, Mr. MacKay?

A. Prior to this last setup. It was when I was up in that area on the Trona visit, or in that period, that I called on the PG&E man that was stationed at Edwards Air Base.

Q. Yes.

A. I didn't tell him what my business was. I told him what my business was but mostly relating to rates, but I was also at that time concerned with whether or not there had ever been any survey, to his knowledge, or any activity along that line. He was the man that was over from Bakersfield and he said not to his knowledge.

Q. What was his name?

A. I don't know his name.

Q. What was his position?

A. He was looking after PG&E's business there. He didn't have an office there yet. I saw him at his residence.

Q. Where was his residence?

A. On the Air Base.

Q. Was he a mechanic?

A. I suppose he was an all-around man, but he was the only representative PG&E had.

Q. What was his position?

A. I don't know what you would call him, whether he was a service man or in charge of the office, or what. There was really no office, it was right in the residence. The bills were still being made out at Bakersfield. He was sent over from Bakersfield.

Q. Is that all you know about him?

A. That's all I know about him, but he told me that if there was anything doing along that line he certainly would know about it. [101]

Q. What was it you asked him?

A. I tried to draw him out as to whether there was any activity along the line there because I knew about the trouble up at Southwest.

Q. What do you mean that you asked if there was any activity along the line there?

A. There would have to be surveys and there would be talk about the territory and he would know about that because that would probably be the headquarters. It was the nearest point where PG&E would headquarter. There was nothing out there unless they set up a camp. If they were in action at that time he would know about the making of surveys.

Q. In action on what?

A. On this line, the proposed line.

Q. What line? A. Up to Trona.

Q. Is that what you are talking about?

A. Yes.

Q. I see. You haven't said so, Mr. MacKay.

A. It was the line. That was the only one I was concerned with and I tried to draw him out to see if he could give me any information and I found out he couldn't.

Q. He didn't know anything about it?

A. He didn't know anything about it.

Q. He had no information?

A. But he admitted if there was anything doing along that line he probably would know about it.

Q. If they were building a pipeline, you mean?

A. Oh, no. That was just the preliminaries. I knew the minute they started building the line. There was no secret about that. But I learned very quickly after I talked with Mr. Coons, possibly within thirty days, that they were [102] in the field with their surveying parties and that a definite report was made to the management on the situation and from then on they were negotiating on a contract.

Q. Of course, you were present when Mr. Coons gave his deposition and testified that it wasn't until August of '54 that Pacific Gas & Electric showed any interest.

A. That's about right.

Q. You heard him say that, did you not?

A. Yes.

Q. And now you are saying that it was in 1954 that you had this conversation with Mr. Coons in which he told you he would negotiate?

A. It was 1954, August.

Q. You previously have taken an oath that it was in '53 that he told you that?

A. Oh, no, 1954.

Q. You are not changing any testimony you have previously given under oath?

A. 1954 was the time I had the talk with Mr. Coons.

Q. Then if you ever made a statement to the contrary it was wrong, or have you ever made a statement to the contrary?

A. I never made a statement contrary to that.

Q. Are you just as sure of this as you are of all your other testimony, Mr. MacKay?

A. If I made that kind of statement it was wrong, I mean about this particular thing. The talk I had with Mr. Ellis was certainly in 1954.

Q. You are positive of that, are you?

A. Yes, 1954. The contract wasn't made until 1955.

Q. We know that. That is a matter of record.

A. Well, the whole thing took place—Mr. Coons testified in the proceedings as to the time he was negotiating [103] with PG&E. It ties in with everything you're talking about here about August.

Q. Let me show you a document entitled 'In the Matter of the Application of W. D. MacKay to Perpetuate Testimony,' being filed in the Superior Court of the State of California, in and for the County of Los Angeles, Case No. 666,207. You are familiar with this?

A. What's that?

Q. This is a copy. Would you examine that and

identify that as a copy of the petition you filed, as indicated?

A. You mean that is in this particular action?

Q. Yes.

A. Oh, yes, Mr. Hayden. Oh, yes, I know of the application that was filed.

Q. You signed it? A. Yes, I signed it.

Q. Is that a copy of what you signed?

A. Well, I assume it is a copy.

Q. You determine it, please.

A. I recall this here and the statement right in here I either underscored it or call Mr. Hayden's attention to it, that it was absolutely wrong—'Until approximately December 31, 1953, Mr. MacKay had numerous contacts with Mr. Hefler in which he advised Mr. Hefler of the progress of his work with the Pacific Gas & Electric Company'—no such thing ever occurred and I told him that and asked him if he wanted to change it, to correct that particular situation.

Q. You are reading from the document I have referred to?

A. I am reading from the same document I signed, because the same language is there. The next morning he advised me—he said he would think that situation over, that he was in a hurry to get away in the evening. It was [104] after 5:00 o'clock and he said the change would be made in the morning. I didn't sign the document until the next day. He said that was immaterial.

Q. Read on now.

A. 'The various pieces of information necessary

to be used by Mr. MacKay; that on or about April 11, 1955'—

Q. Wait a minute. You're not reading intelligently. Let's get into the record what it says, and go slowly enough so that the reporter can take it.

A. —'in which he advised Mr. Hefler of the progress of his work with the Pacific Gas & Electric Company'—which I didn't do at all—'and the Southern California Gas Company in which Mr. Hefler gave Mr. MacKay various pieces of information necessary to be used by Mr. MacKay; that on or about April 11, 1955, Pacific Gas & Electric Corporation signed a contract with the American Potash & Chemical Corporation under which the Pacific Gas & Electric Company was to supply the Trona plant of the American Potash & Chemical Corporation with natural gas.' That is correct.

Q. Which statement was it that was incorrect?

A. The statement in here as to my numerous contacts with Mr. Hefler in which I advised Mr. Hefler of the progress of my work with Pacific Gas & Electric Company and the Southern California Gas Company.

Q. That is a false statement?

A. That is a false statement.

Q. You told Mr. Hayden it was false and he told you it didn't matter; it was immaterial?

A. The next morning when I signed that.

Q. But you signed this document that you read?

A. I signed it on his advice.

Q. Read on down here on Page 3 of the same document. [105] Let me read the whole thing to

you. You follow me as I read it and you tell me if this is what you signed.

'That on or about the 22nd day of November, 1952, Mr. Coons made an oral agreement with W. D. MacKay that if W. D. MacKay would assist the American Potash & Chemical Corporation in obtaining natural gas for use at its Trona, California, plant that the American Potash & Chemical Corporation would pay Mr. W. D. MacKay a reasonable compensation for his services.'

Is all of that correct or did you tell Mr. Hayden that was wrong, too?

A. No. Mr. Hayden had a complete copy of my statement and position on that and that was legal phraseology that I presume he put in there. I know how those things are handled.

Q. You read it over before you signed it?

A. I read it over before I signed it, and that was one of the things I called his attention to.

Q. What did you call his attention to?

A. That there was no definite understanding as to reasonableness of pay and things of that kind.

Q. You didn't have any definite understanding on it?

A. Not as to pay. He asked me and I didn't tell him.

Q. Asked you what?

A. What my fee would be.

Q. Who did? A. Mr. Coons.

Q. I see. You didn't tell him it would be reasonable?

A. I didn't tell him anything at all. If he could

get gas that I would expect a reasonable fee. I told him there would be a reasonable fee if the thing went through.

Q. Let's read on. [106]

'That Mr. Coons turned Mr. MacKay over to R. J. Hefler, the secretary to the American Potash & Chemical Corporation, with the instructions that Mr. MacKay and Mr. Hefler were to work together in connection with the project.' Is that a correct statement?

A. Well, 'work together.' I was to report to him.

Q. Just answer my question, Mr. MacKay. Is that a correct statement or not?

A. It depends on how you interpret it.

Q. You interpret it any way you want to and tell me whether it is a correct statement of what the fact is.

A. The only facts are that I was asked to make my reports direct to Mr. Hefler.

Q. Do you agree that all of this is correct now, or do you want to change any of it.

A. It is too late to change that there. How would you interpret that?

Q. I am not interpreting it. I am asking you if it is a correct statement.

A. The statement as far as it goes is correct, but as far as the actual facts, the only thing that he was to do for me and co-operate with me on was to furnish me any information that I wanted as to the fuel proposition and I was to make reports periodically to him, and he in turn would pass it on to Mr. Coons.

Q. Mr. Coons didn't tell you that he was the secretary of the corporation, did he?

A. No. He told me he was his assistant.

Q. So it isn't correct in saying that he was turning you over to Mr. Hefler, the secretary, because you didn't know that he was the secretary.

A. I didn't know at the time, no. [107]

Q. All right. Reading on, 'That thereafter, on or about the 31st day of December, 1953, Mr. MacKay advised Mr. Coons that the Pacific Gas & Electric Company would go forward with the project of providing gas to the Trona plant of the American Potash & Chemical Corporation and Mr. Coons advised Mr. MacKay because of Mr. Coons' long-standing friendship with the President of Pacific Gas & Electric Corporation that he, Mr. Coons, would take over the negotiations with Pacific Gas & Electric Company and that Mr. MacKay should do nothing further in the transaction.'

Is that a correct statement?

A. No, that is not a correct statement.

Q. And yet you signed the statement to that effect?

A. I signed it and I talked to him about that, too.

Q. What did you tell him?

A. I told him exactly what the facts were.

Q. What was the fact in that regard?

A. Let me see what he is referring to there. 'Advised Mr. Coons.' I never talked with Mr. Coons, as I say, from the time I first met him until 1954, so that was absolutely wrong and I told what you call him.

Q. What did you tell him the facts were?

A. I called his attention to what the facts were.

Q. What were the facts, Mr. MacKay?

A. That I never had any contact with Mr. Coons direct, only twice, in all this proceeding.

Q. What were those?

A. When I first met him in November and then again last July, that is, when I saw him face to face. Then I had this phone conversation when he sent me to Oakland. That's the first time.

Q. Was that in December of '53? [108]

A. Oh, no, that was way after. That was way along in '54.

Q. So you signed a statement under oath to the effect that it was on or about the 31st day of December, 1953, that Mr. Coons told you of his long-standing friendship with Mr. Black?

A. He told me that in 1954.

Q. So this is a wrong statement?

A. That is a wrong statement, and I called his attention to the time element and every factor you are referring to there, because I read that thing very carefully.

Q. And he said it didn't make any difference?

A. He did not right there. The next morning—I didn't sign it that night. I didn't sign it until the next morning, and he said he thought it was o.k. the way it was.

Q. All right.

A. So I was under the advice of an attorney and that's what I signed.

Q. It goes on to say, 'Thereafter Mr. Coons did negotiate with the Pacific Gas & Electric Company thereafter on or about the 11th day of April, 1955. The contract was entered into between Pacific Gas & Electric Company and the American Potash & Chemical Corporation for the supplying of natural gas to the Trona plant of the American Potash & Chemical Corporation.'

Then down here—this is not a signed copy but appears to be a conformed copy—we have the following: 'W. D. MacKay, the petitioner herein, above mentioned, being first duly sworn, deposes and says; that he has read the foregoing petition and he knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on his information or belief, and as [109] to those matters he believes it to be true.'

Did you sign such a statement?

A. Yes, I signed that after being assured by my counsel that it was O.K. to sign it the way it was drawn.

Q. You are a man of age, Mr. MacKay. Do you think it is correct to state under oath something that you know is false?

A. It depends on the circumstances. When you place yourself in the hands of an attorney who is supposed to be skilled in that line and knows what he's doing, if he recommended it and said it was O.K., who was I to argue that point with him?

Q. We're not talking about legal effect. We are talking about facts, testimony.

A. When I called his attention to it he just

brushed it off as if it was just a matter of form or something to that effect.

Q. And he advised you that it would be all right to sign it anyway even though you told him it was incorrect?

A. Yes.

Q. You told him it was incorrect, did you?

A. Yes, I called his attention to these various discrepancies.

Q. Did you understand when you signed this that you were supposed to be making the statement under oath?

A. Certainly, it was under oath there, but, as I say, when you're working with an attorney he is the fellow that is guiding you. I wouldn't have an attorney if I wasn't going to follow his advice, right or wrong.

Q. Let's go back to your statement in this document as to what you expected to prove on Mr. Heffler that you said was to contain an incorrect statement. Reading on Line 15, [110] 'That on or about the 22nd day of November, 1952, he, R. J. Heffler, was called to the office of R. B. Coons, the vice-president of American Potash & Chemical Corporation, and was then told that W. D. MacKay had been employed by the American Potash & Chemical Corporation to assist the American Potash & Chemical Corporation in obtaining natural gas for the Trona plant.'

A. That is absolutely wrong. I never told him any such thing as that and I called his attention to that very fact.

Q. What is wrong about it?

A. Because he never told what you call him I was employed.

Q. He didn't—

A. I never used that terminology and never represented anywhere along the line that Mr. Coons ever made any such statement to Mr. Hefler.

Q. Did he make any such statement to you?

A. No, sir. All he did—Mr. Coons?

Q. Yes.

A. Mr. Coons, when he introduced me, introduced me as a man that apparently knew considerable about natural gas and thought he could be of assistance to them in obtaining gas at Trona. That was the way he introduced me to Mr. Hefler.

Q. That was the only understanding you had with Mr. Coons?

A. No. That's when we were together there. Before that when only Mr. Coons was present, he brought up the matter of compensation.

Q. All right. Let's read on down here and see what other errors you agree to that you signed. Continuing, [111] 'That Mr. Coons instructed Mr. Hefler to give Mr. MacKay such assistance as Mr. MacKay should need in carrying out his plan of getting gas for the Trona plant.'

Was that a correct statement?

A. Only to the extent that it applied to information on the matter of fuel.

Q. 'That thereafter Mr. Hefler gave Mr. MacKay a substantial amount of information to be used by Mr. MacKay in obtaining the natural gas for the Trona plant.'

A. The only information he ever gave me was the—he let me look at his book that I was privileged to take information off that I wanted, but I already had it, you see.

Q. That was in 1952 when you were in the company's office? A. Yes, sir.

Q. Other than that he never gave you any information? A. No, not a bit of it.

Q. You never asked for any, did you?

A. Nothing else. That was all he was authorized to give me.

Q. He never gave you any information nor did you ever ask him for any other information?

A. The only information he gave me of any consequence was the statement when he tipped me off to the fact that Mr. Coons was at Trona in company with some eastern officials.

Q. All right. Reading on, 'And that thereafter, until approximately December 31, 1953, Mr. MacKay had numerous contacts with Mr. Hefler in which he advised Mr. Hefler of the progress of his work with the Pacific Gas & Electric Company and the Southern California Gas Company, and in which Mr. Hefler gave Mr. MacKay various pieces of [112] information necessary to be used by Mr. MacKay.'

Now, it is also incorrect, is it, that you kept him advised of the progress of the work at the Pacific Gas & Electric Company?

A. Yes, absolutely that is incorrect. I very definitely called his attention to that because this was wholly contrary to the facts.

Q. Other than this gentleman you talked to, whose name you don't remember, up at Edwards Air Force Base, you never talked to any Pacific Gas & Electric people?

A. No Pacific Gas & Electric Man." (Emphasis supplied.)

With respect to the testimony of the plaintiff W. D. MacKay so far as the West End Chemical Company is concerned, the following testimony was given by Mr. MacKay in the aforesaid deposition:

"Q. Now, I notice on this memorandum we have been referring to here that apparently you had a telephone conversation with Mr. Ellis after you received this letter from him in which he declined giving you any compensation.

A. I just phoned him as a matter of courtesy, telling him that I wanted to notify him that I would like to meet him and discuss this situation.

Q. What did he say?

A. I never met him personally.

Q. What did he say?

A. Well, he recalled the conversation. He said, of course, he didn't have anything to do with this whole deal; that he was leaving the whole matter up to the American.

I said, 'Well, you certainly recall, do you not?'—
I said, 'Your statement in your letter is contrary to the facts. You certainly recall the conversation I had with you on the phone, do you not?' [113]

'Yes,' he said, 'I recall some such.'

I said, 'Well, then, as far as the statement in your letter is concerned, that is erroneous,' and he shut

me off with 'Well, it's a matter that will have to be handled through Mr. Coons.'

Q. Did you make any statement in this conversation to Mr. Ellis that he owed you some compensation?

A. No. I wanted to straighten him out on the statement that I think he made in his letter—I've got it right here—that 'There has not been and there is not now any understanding between this company and yourself in connection with the use of your services'—he never heard of me at all. He sent a copy of the letter so I knew he was in direct touch with Mr. Coons on the situation and I wanted to straighten him out on that. It was just a matter of courtesy that I brought it to his attention.

Q. The sentence reads, 'There has not been and there is not now any understanding between this company and yourself in connection with the use of your services in this or any other matter and, therefore, the matter of proper compensation to you is not a matter in which we are in any way concerned.'

A. Yes, that is correct, and I told him—I said 'I am not calling you and I didn't write you that letter making any demands on you beyond what might be inferred from the conversation I had with you,' and I said, 'I gather from this conversation that you are backing up what Mr. Coons says, that he never heard of me, you might say,' and I said, 'I am only calling you to find out whether or not you recall the conversation I had with you in Oakland,' and he did. [114]

Q. You didn't make any claim for compensation?

A. I made no claim on him. I had no contract with him, I had nothing. I only talked to the man once."

That in the deposition of plaintiff affiant interrogated plaintiff with respect to the nature of any agreement he had with defendants American Potash & Chemical Corporation and West End Chemical Company and affiant testified in effect, as the portions of this testimony hereafter quoted will show, that he did not have an exclusive arrangement and that if he failed in his efforts to secure natural gas service for defendants, he would not expect any compensation.

"Q. Do I undersand, then, that you told Mr. Minister that whether or not you would get any compensation would depend on whether or not you obtained gas for Trona?

A. Absolutely I told him. We discussed the fact that I was willing to take that risk; that if we failed I would simply be out and that was all there was to it.

Q. If you got gas you would expect compensation; but if you did not get gas you would not expect compensation?

A. That is absolutely correct."

* * *

"A. I want to put that in the record to make it a matter of record and I am giving Mr. Norman Sutherland's name, who is now president of the PG&E Company and the man who signed the contract later, so if they want to make an investigation as to whether or not Mr. Coons was doing some work

on the side on this deal unbeknownst to me, that that is a fact.

Q. You think Mr. Coons wasn't supposed to be doing anything?

A. I didn't deny him that right but I was led to believe all the time that I was handling this situation, [115] but that was not exclusive. There would be no objection on my part, anything he wanted to do, but he never mentioned to me this matter under any conditions, and this indicates what I have learned since completely verifies what my opinion was all the time as to the attitude and position of PG&E in this whole matter."

/s/ WILLIAM F. SPALDING.

Subscribed and Sworn to before me this 2nd day of January, 1958.

[Seal] /s/ FRANCES G. ZIEBACH,
Notary Public in and for Said
County and State.

My Commission Expires: 9/29/58

[Endorsed]: Filed January 3, 1958. [116]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT AND
NOTICE OF MOTION

Defendants American Potash & Chemical Co., Inc., a corporation, and Stauffer Chemical Company, a corporation, hereby severally move the above

Honorable Court to enter a summary judgment dismissing the Complaint herein as to each moving defendant upon the ground that as to each cause of action therein stated there is no genuine issue, and no substantial evidence, to support a material fact prerequisite to any recovery by plaintiff on each cause of action, as more particularly specified hereinafter. [117]

I.

There is no substantial evidence to support plaintiff's allegations in the First Cause of Action, and more particularly in Paragraph V thereof, that the alleged contracts or either of them were entered into as a result of plaintiff's services or efforts, or that the obtaining of natural gas service by moving defendants or either of them was in any way the result of plaintiff's services or efforts.

II.

There is no substantial evidence to support plaintiff's allegations in the Second Cause of Action, and more particularly in Paragraph I thereof by reference to Paragraph V of the First Cause of Action, that the alleged contracts or either of them were entered into as a result of plaintiff's services or efforts, or that the obtaining of natural gas service by moving defendants or either of them was in any way the result of plaintiff's services or efforts.

III.

There is no substantial evidence to support plaintiff's allegations in the Third Cause of Action, and

more particularly in Paragraph I thereof by reference to Paragraph V of the First Cause of Action, that the alleged contracts or either of them were entered into as a result of plaintiff's services or efforts, or that the obtaining of natural gas service by moving defendants or either of them was in any way the result of plaintiff's services or efforts.

Said motion is made and based upon each of the aforesaid grounds, upon all the files and records in this action, including any responses of plaintiff adverse to himself, to defendants' interrogatories now on file, whether such answers have or have not been filed as of the date of this motion, upon the affidavits [118] served and filed herewith, and upon the memorandum of points and authorities filed herewith.

Dated: January 3, 1958.

VINCENT H. O'DONNELL,
FREDRIK S. WAISS,

By FREDRIK S. WAISS, per

/s/ LESLIE G. TURNER,

Attorneys for Defendant Stauffer Chemical Company, a Corporation.

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
LESLIE G. TURNER,
MARTIN E. WHELAN, JR.,

By /s/ LESLIE G. TURNER,

Attorneys for Defendant American Potash & Chemical Co., Inc., a Corporation.

Notice of Motion

To the Plaintiff, W. D. MacKay, and to His Attorney, Gerald H. Gottlieb:

Please Take Notice that the above motion will be brought on for hearing before the above-entitled court in the courtroom of the Honorable Harry C. Westover, United States Post Office and Court House Building, 312 North Spring Street, Los Angeles, California, on the 13th day of January, 1958, at 2:00 o'clock p.m., or [119] as soon thereafter as counsel can be heard.

VINCENT H. O'DONNELL,
FREDRIK S. WAISS,

By FREDRIK S. WAISS, per

/s/ LESLIE G. TURNER,

Attorneys for Defendant Stauffer Chemical Company, a Corporation.

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
LESLIE G. TURNER,
MARTIN E. WHELAN, JR.,

By /s/ LESLIE G. TURNER,

Attorneys for Defendant American Potash & Chemical Co., Inc., a Corporation.

[Endorsed]: Filed January 3, 1958. [120]

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The motion of defendants American Potash & Chemical Co., Inc., and Stauffer Chemical Company, for a summary judgment dismissing the above action came on regularly for hearing on January 13, 1958, at 2:00 o'clock p.m. in the Courtroom of the Honorable Harry C. Westover; plaintiff appearing through his attorney, Gerald H. Gottlieb, and defendant American Potash & Chemical Co., Inc., appearing through its attorneys, Gibson, Dunn & Crutcher and Leslie G. Turner, and defendant Stauffer Chemical Company appearing through its attorney, Fredrik S. Waiss. The Court having duly heard oral argument on behalf of all parties, having considered all points and authorities, affidavits, and other papers on file, now make the following [122] Findings of Fact and Conclusions of Law with respect to said motion for summary judgment:

Findings of Fact

1. There is no substantial evidence to support plaintiff's allegations in the First Cause of Action, and more particularly in Paragraph V thereof, that the alleged contracts or either of them were entered into as a result of plaintiff's services or efforts, or that the obtaining of natural gas service by moving defendants or either of them was in any way the result of plaintiff's services or efforts.

2. There is no substantial evidence to support plaintiff's allegations in the Second Cause of Action, and more particularly in Paragraph I thereof by reference to Paragraph V of the First Cause of Action, that the alleged contracts or either of them were entered into as a result of plaintiff's services or efforts, or that the obtaining of natural gas service by moving defendants or either of them was in any way the result of plaintiff's services or efforts.

3. There is no substantial evidence to support plaintiff's allegations in the Third Cause of Action, and more particularly in Paragraph I thereof by reference to Paragraph V of the First Cause of Action, that the alleged contracts or either of them were entered into as a result of plaintiff's services or efforts, or that the obtaining of natural gas service by moving defendants or either of them was in any way the result of plaintiff's services or efforts.

4. There is no triable issue of fact as to any of the matters heretofore set forth in Paragraphs 1, 2 and 3 of these Findings of Fact.

Conclusions of Law

1. If there was in fact ever any agreement between the plaintiff and the moving defendants or either of them, any such [123] agreement was not an exclusive right on the part of the plaintiff to obtain or attempt to obtain the furnishing of natural gas service to the plants of the moving defendants and each of them.

2. If there was ever any agreement between the plaintiff and the defendants or either of them, plaintiff never performed the services upon which any right to compensation was conditioned and is not entitled to any compensation whatsoever from either of the moving defendants.

3. The above-entitled action should be dismissed with costs awarded to prevailing defendants.

Dated: January, 1958.

.....,
HARRY C. WESTOVER,

Judge, United States District Court, Southern District of California, Central Division.

Lodged January 3, 1958. [124]

[Title of District Court and Cause.]

PROPOSED JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law, signed by this Court, on the date hereinbelow entered on this Judgment, It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That the above-entitled action is dismissed as to defendants American Potash & Chemical Co., Inc., a corporation, and Stauffer Chemical Company, a corporation, and each of them;

2. That defendant American Potash & Chemical Co., Inc., a corporation, recover from the plaintiff its cost of suit herein in the sum of \$.

3. That defendant Stauffer Chemical Company, a corporation, recover from the plaintiff its costs of suit herein in the sum [126] of \$.....

Dated: January, 1958.

.....,
HARRY C. WESTOVER,
Judge, United States District Court, Southern District of California, Central Division.

Lodged January 3, 1958. [127]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

The above-named plaintiff hereby substitutes himself, W. D. MacKay, in propria persona, as his attorney of record in place of Gerald H. Gottlieb.

Dated: Jan. 24, 1958.

/s/ W. D. MacKAY.

Approved:

/s/ GERALD H. GOTTLIEB.

Dated: January 23, 1958.

It is so ordered: 1/27/57.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed January 27, 1958. [131]

[Title of District Court and Cause.]

MINUTES OF THE COURT, JAN. 13, 1958

Present: Hon. Harry C. Westover, District Judge.

Counsel for Plaintiff: G. H. Gottlieb.

Counsel for Defendant American Potash
& Chem. Co.: Martin E. Whelan, Jr.

Proceedings:

For (1) hearing motion of defendant American
Potash & Chemical (filed 12/6/57) to dismiss;

(2) Hearing motion of defendants (filed 1/3/58)
for summary judgment;

(3) Further pretrial.

Attorney Gottlieb requests a continuance.

It Is Ordered that cause is continued to Jan. 27,
1958, 2:00 p.m., for hearing on said motions and
further pretrial.

JOHN A. CHILDRESS,

Clerk;

By /s/ MARY O. SMITH,

Deputy Clerk. [132]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause having been shown and the Court hav-
ing considered the Affidavit of W. D. MacKay on
file herein, the Motion for Summary Judgment here-
tofore set for hearing on Monday, January 27, 1958,

is hereby continued to Feb. 17, 1958, at the hour of 10:00 o'clock a.m.

Plaintiff is also granted an extension to and including February 17th, 1958, within which to file his Answer to defendant's Interrogatories on file herein.

Dated: January 27, 1958.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed January 27, 1958. [135]

[Title of District Court and Cause.]

AFFIDAVIT OF W. D. MacKAY IN SUPPORT
OF MOTION FOR CONTINUANCE

State of California,
County of Los Angeles—ss.

W. D. MacKay, being first sworn, deposes and states:

I am the plaintiff in this action. That there is now pending a Motion for Summary Judgment on behalf of the defendants herein which is set for hearing on Monday, January 27, 1958.

That my attorney of record is Gerald H. Gottlieb; that as shown more particularly by the Substitution of Attorneys filed concurrently herewith it has been mutually agreed between us that Mr.

Gottlieb will withdraw from the case and that I will be represented by myself in propria persona. That in view of the detailed and complicated technical legal documents filed by the defendants herein it is essential that I have legal counsel to be adequately represented; that despite diligent efforts I have been unable so far to procure competent substitute legal counsel. [136]

That affiant is informed and believes and therefore alleges that he should be granted an extension or continuance of not less than forty-five (45) days within which to secure new counsel and adequately acquaint such counsel with the facts of the transaction in order that such counsel may, if necessary and desirable, exhaust proper discovery procedures prior to the hearing of pending Motion for Summary Judgment and answer defendant's interrogatories on file herein.

/s/ W. D. MacKAY.

Subscribed and sworn to before me this 21st day of January, 1958.

[Seal] /s/ MARIN T. KRISTOVICH,
Notary Public in and for Said
County and State.

[Endorsed]: Filed January 27, 1958. [137]

[Title of District Court and Cause.]

MINUTES OF THE COURT, JAN. 27, 1958

Present: Hon. Harry C. Westover, District Judge.

Deputy Clerk: Mary O. Smith.

Reporter: S. J. Trainor.

Plaintiff W. D. MacKay in pro. per.

Counsel for Defendant American Potash
& Chem. Co.: Martin E. Whelan, Jr.

Proceedings:

For (1) hearing motion of defendant American Potash & Chemical Co. (filed 12/6/57) to dismiss.

(2) Hearing motion of defendants (filed 1/3/58) for summary judgment;

(3) Further pretrial.

Plaintiff W. D. MacKay makes a statement and requests a continuance in order to secure new counsel.

Attorney Whelan makes a statement re interrogatories not answered by plaintiff.

It Is Ordered that all of the above matters continued to Feb. 17, 1958, 10:00 a.m., for further proceedings.

JOHN A. CHILDRESS,

Clerk;

By /s/ MARY O. SMITH,

Deputy Clerk. [138]

[Title of District Court and Cause.]

AFFIDAVIT OF W. D. MacKAY IN SUPPORT
OF MOTION FOR CONTINUANCE

State of California,
County of Los Angeles—ss.

W. D. MacKay, being first sworn, deposes and states:

I am the plaintiff in this action. That there is now pending a Motion for Summary Judgment on behalf of the defendants herein which is set for hearing on Monday, February 17, 1958.

That in view of the detailed and complicated technical legal documents filed by the defendants herein it is essential that I have legal counsel to be adequately represented; that despite diligent efforts I have been unable so far to procure competent substitute legal counsel, and am still appearing in *propria persona*.

That I had approached at least one attorney with regard to taking my case and that he became ill with the current influenza and has been unable to analyze the case preliminary to deciding whether to represent me or not. [139]

That as shown by the file herein, defendants are well represented by at least six attorneys, who seem determined to freeze my case out and prevent its trial on the merits, by making a series of complicated and technical motions.

That affiant is advised and believes and therefore alleges that the Court has been most generous in allowing litigants with prominent lawyers substantial extensions of time in many cases.

That affiant is informed and believes and therefore alleges that he should be granted an extension or continuance of not less than forty-five (45) days within which to secure new counsel and adequately acquaint such counsel with the facts of the transaction in order that such counsel may, if necessary and desirable, exhaust proper discovery procedures prior to the hearing of the pending Motion for Summary Judgment.

/s/ W. D. MacKAY.

Subscribed and sworn to before me this 13th day of February, 1958.

[Seal] /s/ FREDERICK G. CARPENTER,
Notary Public in and for Said
County and State.

[Endorsed]: Filed February 17, 1958. [140]

[Title of District Court and Cause.]

PLAINTIFF'S ANSWERS TO
DEFENDANTS' INTERROGATORIES

State of California,
County of Los Angeles—ss.

Now Comes W. D. MacKay, plaintiff herein, in propria persona, and being first duly sworn, an-

swers the Interrogatories of Defendants herein as follows:

Interrogatory No. 1:

With what officers, agents and employees, if any, of Pacific Gas & Electric Company have you at any time on or before April 11, 1955, been in personal or telephonic conference with or directed any other type of communication to (whether by letter, telegram or any other means), or received any other type of communication from (whether by letter, telegram or any other means), concerning or in any way related to the furnishing of natural gas service by Pacific Gas & Electric Company to either the general [141] area of and around Trona, California, or to any plant of American Potash & Chemical Co., Inc., in or around that area, or to any plant of the then West End Chemical Company in or around that area, or to any combination of the aforementioned. As to each such communication, state, after the name of the particular officer, agent, or employee of Pacific Gas & Electric Company named by you:

(a) The date of each conference with, and each other communication from, or directed to that person;

(b) The type of communication, whether with you and that person present together, by telephone, letter, telegram, or other means;

(c) As to each communication other than where you and the other person were present together, who wrote or otherwise originated the communication;

(d) What was said or written by either you or that other person or both in each such communication;

(e) Whether you have in your possession or under your control either the written communication involved, or any written memoranda of the oral communication involved.

Answer to Interrogatory No. 1:

None.

Interrogatory No. 2:

With what officers, agents and employees, if any, of Pacific Gas & Electric Company have you at any time after April 11, 1955, and to and including October 1, 1955, been in personal or telephonic conference with or directed any other type of communication to (whether by letter, telegram or any other means), or received any other type of communication from (whether by letter, telegram or any other means), concerning or in any way related to the furnishing of natural gas service by Pacific Gas & Electric Company to either the general area of and around Trona, California, or to any plant of American Potash & Chemical Co., Inc., in or around that area, or to [142] any plant of the then West End Chemical Company in or around that area, or to any combination of the aforementioned. As to each such communication, state, after the name of the particular officer, agent, or employee of Pacific Gas & Electric Company named by you:

(a) The date of each conference with, and each other communication from, or directed to that person;

(b) The type of communication, whether with you and that person present together, by telephone, letter, telegram, or other means;

(c) As to each communication other than where you and the other person were present together, who wrote or otherwise originated the communication;

(d) What was said or written by either you or that other person or both in each such communication;

(e) Whether you have in your possession or under your control either the written communication involved, or any written memoranda of the oral communication involved.

Answer to Interrogatory No. 2:

None.

Interrogatory No. 3:

To your personal knowledge, what individuals, if any, including yourself, other than individuals now known by you to have then been officers, or full-time regular employees of either (i) American Potash & Chemical Co., Inc., (ii) the then West End Chemical Company, or (iii) Pacific Gas & Electric Company, had anything to do with interesting Pacific Gas & Electric Company in furnishing

natural gas service either to the general area of and around Trona, California, or to the plant in that area of American Potash & Chemical Co., Inc., or to the plant in that area of the then West End Chemical Company, or more than one of the foregoing. As to each such individual, and next to his or her name, state:

(a) What you know that individual did in so interesting Pacific Gas & [143] Electric Company:

(b) To the extent known, the approximate date or dates on which such was done by each such individual;

(c) To the extent that you have no personal knowledge of what each such individual did in so interesting Pacific Gas & Electric Company, what you believe them to have done based on information or any type which you now have;

(d) To the extent that you do not know of your own knowledge the approximate date or dates on which such was done by any such individual, state the approximate date or dates on which you believe such was done based upon any information which you now have;

(e) If there are any affirmative responses to subparts (c) and (d), upon what information are the affirmative responses to subparts (c) and (d) based, and from whom was that information obtained, and do you have in your possession or under your control any written documents or other records evidencing such information:

Answer to Interrogatory No. 3:

(1) Howard L. Minister, Former Mechanical Engineer, Utilities Procurement Division, 11th Naval District, San Diego, Calif.

Clarence L. Alliman, Present Director of Utilities, District Public Works Office, 11th Naval District, San Diego, Calif.

(a) As to Howard L. Minister: On or about October 15th or 18th, 1951, he personally conferred with Mr. James Black, then President, or Chairman of the Board of Directors, Pacific Gas & Electric Company in the P. G. & E. Co. building at San Francisco. I understand Mr. Minister went into detail as to the volume of gas that might be used by American Potash & Chemical Co., West End Chemical Co., as well as the Communities of Trona and West End. Amount of gas also that might be used by the U. S. Naval Ordnance Depot at China Lake and the Community of Ridgecrest. Explained the preponderant position of the two Chemical Companies and of the large volume of gas (on an interruptible [144] basis) necessary to offset their present use of fuel oil in their respective Plants located at Trona and West End, known as the "Trona area." This was the second meeting Mr. Minister had with Mr. Black on this same proposition. I understand Mr. Black advised Mr. Minister that they (P. G. & E.) had talked with our Southern Utility (presume Southern California Gas Co.) re-

garding this matter. I understand Mr. Minister, in a meeting with American Potash & Chemical officials, advised them of his meetings with Mr. Black—assuring him he would contact him just as soon as this amount of gas was available and go along with the proposition. I also understand Mr. Minister talked with representatives of P. G. & E. Co., including Mr. Black, the second week in October and the first week in November, 1952, but I have no knowledge who these representatives were nor what was discussed, and there may have been other meetings during the first seven months of 1952.

(b) As stated in (a) there was a meeting with Mr. Black prior to October 15-18, 1951; and also one on or about October 8-11th, 1952. Mr. Minister, on or about October 8 to 11, 1951, visited the plant of American Potash & Chemical Co., in Trona and advised them Mr. Black had assured him that he would contact him just as soon as this amount of gas was available.

I do not know with whom Mr. Minister discussed this matter at the American Plant on this occasion.

(c) I discussed these visits with Mr. Black and others in detail with Mr. Minister in my meeting with him in Cheyenne, Wyoming, on February 2, 1957, and also later in Los Angeles, California. It is my understanding in all these talks with P. G. & E. Co. officials, he stressed the importance of this business, giving them full details as to the position of the U. S. Navy's possible demands and explain-

ing their load would not justify building a line to serve. Also he advised Mr. Black of his surveying the area through which he felt it would be feasible to construct the pipeline to Trona, and also explained the location of Ridgecrest and the Naval Station in relation to the pipeline that would have to be built to serve the [145] two Chemical plants in the vicinity of Trona.

(d) As to the dates mentioned above, these are from information given me by Mr. Minister.

(e) In addition to the verbal information given me by Mr. Minister, I have his written report verifying same.

(2) (a) Clarence L. Alliman succeeded Mr. Minister at San Diego when the latter was transferred to the Philippine Islands on January 16, 1953. Mr. Alliman, accompanied by Mr. Robert M. Coons, Vice. Pres., American Potash & Chemical Co., in the early Fall of 1953 (possibly in September or October), called on Mr. Sutherland, President and General Manager of P. G. & E. Co., in San Francisco. He explained the position of the Navy, and I assume went over the entire project in about the same way as had Mr. Minister in his talks with Mr. Black. This meeting resulted in Mr. Sutherland advising them P. G. & E. Co. were then not interested in the matter—that they had insufficient gas, and possibly gave other reasons. I am not aware at this time what other officials of the P. G. & E. Co. might have been contacted at the same time.

(b) I am not aware of other meetings Mr. Alliman may have had with any other official of Pacific Gas & Electric Co. regarding this matter.

(c) I have discussed this with Mr. Alliman on several occasions and feel sure he did everything possible at that time to interest P. G. & E. Co. in providing gas for the area, although prior to that time there were no funds (capital) through which the Navy could pay any portion of the short transmission line necessary to bring the gas to the Ordnance Station, which condition I understand continued to exist up to the time P. G. & E. Co. received authorization from the P. U. C. to construct this line to the Ridgecrest area, and still does.

(d) I place this meeting in San Francisco to have taken place at time indicated from information I obtained from Mr. Alliman.

(e) I have no written report from Mr. Alliman covering this, or any other visits he may have made with P. G. & E. Co. relative to this matter. [146]

Interrogatory No. 4:

What individual, if any, including yourself, other than individuals now known by you to have then been officers or full-time regular employees of either (i) American Potash & Chemical Co., Inc., (ii) the then West End Chemical Company, or (iii) Pacific Gas & Electric Company, do you now have any information other than personal knowledge upon which to assert that those individuals had anything

to do with interesting Pacific Gas & Electric Company in furnishing natural gas service either to the area of and around Trona, California, or to the plant in that area of American Potash & Chemical Co., Inc., or to the plant in that area of the then West End Chemical Company, or more than one of the foregoing. As to each such individual, and next to his or her name, state:

(a) What that information indicates as to what the particular individual did in so interesting Pacific Gas & Electric Company;

(b) What that information indicates as to the approximate date or dates on which such was done by each such individual;

(c) From whom the information was obtained;

(d) Whether you have in your possession or under your control any written documents or other records evidencing such information.

Answer to Interrogatory No. 4:

I do not at this time recall talking with or hearing of any person, other than those referred to in Interrogatory No. 3, who may have sought to interest P. G. & E. Co. to make natural gas possible to the Trona area.

Interrogatory No. 5:

With what members, agents and employees of the California Public Utilities Commission have you at

any time on or before July 12, 1955, been in personal or telephonic conference with or directed any other type of communication to (whether by letter, telegram or any other means), or received any other type of communication from (whether by letter, telegram or any other means), concerning or in any way related to the furnishing of [147] natural gas service by Pacific Gas & Electric Company to either the general area of and around Trona, California, or to any plant of American Potash & Chemical Co., Inc., in or around that area, or to any plant of the then West End Chemical Company in or around that area, or to any combination of the aforementioned. As to each such communication, state, after the name of the particular member, agent, or employee of the California Public Utilities Commission named by you:

(a) The date of each conference with, and each other communication from, or directed to that person;

(b) The type of communication, whether with you and that person present together, by telephone, letter, telegram or other means;

(c) As to each communication other than where you and the other person were present together, who wrote or otherwise originated the communication;

(d) What was said or written by either you or that other person or both in each such communication;

(e) Whether you have in your possession or under your control either the written communication involved, or any written memoranda of the oral communication involved.

Answer to Interrogatory No. 5:

(a) As to talking with any member of the Public Utilities Commission Staff—I do not at this time recall the names of any. However, it is probable I did tell one or more such employees of the effort I was making to obtain natural gas for the two Chemical Companies and of the arrangement I had with the American Potash & Chemical Co. for doing so. Since I presently have no clear recollection of any such talks I am unable to state any date.

(b) If I had such talk, or talks, they would have been verbal and in connection with the general natural gas situation, or some particular case then in action before the P. U. C. No date known.

(c) Verbal, as explained in (b), and would be originated by me.

(d) Do not recall any such meetings, but if occurred I am sure [148] would refer to my arrangement with American Potash & Chemical Co. to assist them in obtaining natural gas for their own use and the area's use. No written communication of any kind.

(e) I do not recall ever receiving any written communication on this subject from any employee

of the Public Utilities Commission of the State of California.

Interrogatory No. 6:

Did you in any way participate in the hearings of the Public Utilities Commission of the State of California held in connection with the request for approval of the contracts entered into on or about April 11, 1955, between American Potash & Chemical Co., Inc., and Pacific Gas & Electric Company, and West End Chemical Company and Pacific Gas & Electric Company? If so, state the nature of your participation and exactly what you did in those hearings.

Answer to Interrogatory No. 6?

As to participating in the hearings before the Public Utilities Commission of the State of California wherein the two Chemical Companies were seeking approval of the contracts entered into with P. G. & E. Co. on or about April 11, 1955—the answer is I did not participate. I was fully informed as to the applications previously filed, as well as the hearing date, but in view of Mr. Coons' statement relative to his long-standing friendship for Mr. Black, I felt he was acting in line with our talk over the 'phone when I return from talking with Mr. Ellis in Oakland.

Dated: February 17th, 1958.

/s/ W. D. MacKAY.

Subscribed and sworn to before me this 17th day of February, 1958.

[Seal] /s/ MARGARET SILVA,
Notary Public in and for Said
County and State.

My Commission Expires July 8, 1960.

[Endorsed]: Filed February 17, 1958. [149]

[Title of District Court and Cause.]

MINUTES OF THE COURT, FEB. 17, 1958

Present: Hon. Harry C. Westover, District Judge.

Plaintiff: W. D. MacKay in pro. per.

Counsel for Defendant American Potash
& Chem. Co.: Martin E. Whelan, Jr.

Counsel for Defendant West End Chemical: Frederick S. Waiss.

Proceedings:

For (1) hearing motion of defendant American Potash & Chemical Co. (filed 12/6/57), to dismiss;

(2) Hearing motion of defendants (filed 1/3/58), for summary judgment;

(3) Further pretrial.

Court makes a statement to plaintiff appearing in pro. per.

Plaintiff makes a statement to the Court and requests a continuance in order to secure counsel.

Court makes a further statement.

Attorney Whelan makes a statement opposing any further continuance.

It Is Ordered that all matters herein are continued to March 17, 1958, 10:00 a.m., for further proceeding.

JOHN A. CHILDRESS,
Clerk;

By /s/ MARY O. SMITH,
Deputy Clerk. [152]

[Title of District Court and Cause.]

AFFIDAVIT OF W. D. MacKAY IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

W. D. MacKay, being first duly sworn, deposes and says:

- (1) That he is the plaintiff herein;
- (2) That he is presently appearing in propria persona, among other reasons, for the reason that he is financially unable to pay the substantial legal fees necessary to place the prosecution of his suit on a par with the capable representation of defendants, who, as large corporations, have retained numerous eminent counsel;
- (3) That to the best of his knowledge and belief, defendants' motion for summary judgment and

the affidavits supporting it do not clearly show that no triable issue of fact remains in the case;

(4) That he demonstrated the feasibility and desirability of gas service to [171] the subject defendants' to the representatives of the Southern California Gas Company in the fall of 1952. That to the best of his knowledge and belief PG&E had never been interested in servicing the defendants. That he offered to contact PG&E personnel to expedite discussions between the defendants, PG&E and the Southern California Gas Company complex (The Pacific Lighting Group) but that representatives of defendants and the Pacific Lighting Group advised him they would take the next step of initiating such negotiations and/or discussion.

(5) That the area under discussion is a "fringe" area, and that gas service to users in such area is normally the subject of direct negotiations between the PG&E and the Pacific Lighting Group;

(6) That to the best of his knowledge and belief, he induced, effected and set in motion the chain of events that directly and proximately culminated in the contract between PG&E and defendants.

(7) That he is at a loss to explain certain statements, made by defendants' affiants which are contrary to his knowledge and belief of the activities of the parties. That such sharp conflict as to such questions of fact can only be resolved by a trial with full and proper cross-examination.

(8) That plaintiff cannot now oppose statements of Messrs. Jacobs and Gumz that each of them did not contact the other's employer company, and the unwarranted inference that no one in either company contacted the other company, since such facts are peculiarly within the knowledge of the executive personnel of PG&E and the Pacific Lighting Group.

(9) That plaintiff has not yet taken the depositions of such personnel since he had no reason to believe that qualified denials of such inter-company negotiations would be made. In addition such procedure would be very expensive, and unless essential, plaintiff did not wish to incur such expense.

(10) That if and only if the determination of the motion for summary judgment turns on the presence or absence of negotiations and/or contracts and/or discussions between such executive personnel, plaintiff desires to take their depositions.

/s/ W. D. MacKAY.

Subscribed and sworn to before me this 11th day of March, 1958.

[Seal] /s/ GERTRUDE M. BERG,
Notary Public in and for Said
County and State.

Commission expires 1/30/62.

[Endorsed]: Filed March 11, 1958. [172]

[Title of District Court and Cause.]

MOTION TO STRIKE PORTIONS OF AFFIDAVITS OF J. H. GUMZ, ROBERT D. COONS, W. M. JACOBS, GEORGE C. ELLIS, AND WILLIAM F. SPAULDING

Now comes plaintiff and moves the Court to strike portions of the affidavits of the above-named persons, attached to defendants' motion for Summary Judgment, on the grounds that such affidavits do not comply with Rule 56(e), Federal Rules of Civil Procedure, in the following particulars:

1. Affidavit of J. H. Gumz—December 27, 1957:

p. 2, 11. 2-11—Statement is not made on "personal knowledge" (Rule 56(e)), since oral inquiries could have been made to PG&E personnel other than affiant. Statement is obviously inadmissible hearsay, as framed. Statement is a conclusion.

p. 2, 1.31-P. 3, 1.5—Whether or not affiant was so "advised" is immaterial to the determination of this motion. Statement is inadmissible hearsay. [175]

p. 3, 11. 5-13—Affiant can describe only facts within his own knowledge. Speculation or conclusions as to actions of other PG&E personnel is inadmissible. Statement calls for hearsay.

p. 3, 11. 17-24—Statement is clearly conclusory, and to the extent beyond affiant's "personal knowledge," is inadmissible hearsay.

p. 3, 11. 24-27—Statement is incompetent, irrelevant and immaterial. An affiant's lack of knowledge is not proof of a disputed fact.

p. 3, 1. 28-p. 4. 1.2—Statement is incompetent, irrelevant and immaterial. Affiant's lack of knowledge is not evidence.

As shown by examination of such affidavit, the majority thereof consists of statements that affiant has no knowledge of disputed facts. Defendants' transparent attempt to raise an inference therefrom in their favor is clearly improper upon a motion for Summary Judgment, where affiant, an employee of a company friendly to defendants, is not available for cross-examination.

2. Affidavit of Robert D. Coons—January 2, 1958:

p. 2, 11. 2-4—Conclusion. Argumentative.

p. 2, 11. 13-16—Argumentative, irrelevant and immaterial.

p. 3, 1. 3—"Resulted" is conclusion.

p. 3, 11. 5-7—Controverted by p. 2, 11. 8-14 complaint, hence immaterial here.

p. 3, 11. 8-10—Affiant's lack of knowledge is not a "fact" under Rule 56(e). [176]

3. W. M. Jacobs' Affidavit—December 27, 1957:

p. 2, 11. 6-8—Ambiguous as to whether "purpose" (1.6) was joint or Mr. Jacobs' only.

p. 2, 1. 18—"Belief" is not the "personal knowledge" required by Rule 56(e).

p. 2, 11. 26-27-p. 2, 1. 32-p. 3, 1.1—Mr. Jacobs' lack of knowledge is not a "fact" made on "personal knowledge" as to which he is competent to testify. No mention of Pacific Lighting Co., Southern California Gas Company's "activities" in this regard.

p. 3, 11. 1-8—No mention of Pacific Lighting Company.

Mr. Jacobs' affidavit is cleverly drawn to raise the inference that since Mr. Jacobs did not (assertedly) contact PG&E, no one did. The affidavit fails to mention that Southern California Gas Company's parent company, and its officers negotiated such agreements and "deals" or that its sister supply company, Pacific Lighting Gas Supply Company (also owned by Pacific Lighting Company), and its officers, had over-all supervision of gas supply, etc. The affidavit is limited to Southern California Gas Company. These studied omissions plus the mentioned deficiencies in the affidavit, demonstrate the frail weight of such affidavit.

4. George C. Ellis' Affidavit—December 30, 1957:

p. 2, 11. 4-5—Conclusion as to what "led to" contract.

p. 2, 11. 12-16—"Information and belief" is not the personal knowledge required by Rule 56(e). [177]

5. William F. Spaulding Affidavit—January 2, 1958:

p. 1, 1. 30-p. 17, 1. 3—This reference to the Proceedings to Perpetuate Testimony is doubly objectionable. First, the Motion for Summary Judgment does not specify such testimony as a basis for such motion. Second, defendants have not attached to such affidavit “sworn or certified copies” of such testimony to the affidavit as required by Rule 56(e). No compliance with Rule 26(d) regarding proper foundation before use of such material is alleged or proven.

p. 17, 11. 8-11—Conclusion of counsel. Argumentative.

p. 17, 1. 12-p. 18, 1. 6—Same objections as above to such material.

As demonstrated above, a substantial portion of defendants’ affidavits are seriously defective. In view of defendants’ competent counsel, plaintiff submits that the proper procedure would be to strike all such affidavits, and so moves, or, in the alternative, moves to strike the portions so specified.

This Motion is based upon each of the above grounds, upon all the records, files and papers in such action, and upon the Points and Authorities filed concurrently herewith.

Dated: March 11th, 1958.

/s/ W. D. MacKAY,
In Pro. Per.

Notice of Motion

To the Defendants, and to Their Attorneys:

Please Take Notice that the above motion will be brought on for hearing before the above-entitled court in the courtroom of the [178] Honorable Harry C. Westover, United States Courthouse Building, 312 North Spring Street, Los Angeles, California, on the 17th day of March, 1958, at 10:00 o'clock a.m. or as soon thereafter as the parties can be heard.

/s/ W. D. MacKAY,

In Pro. Per.

[Endorsed]: Filed March 11, 1958. [179]

In the United States District Court, Southern
District of California, Central Division

No. 933-57—HW

W. D. MacKAY,

Plaintiff,

vs.

AMERICAN POTASH & CHEMICAL CO., INC.,
a Corporation, et al.,

Defendants.

MOTION FOR CONTINUANCE OF HEARING
OF MOTION FOR SUMMARY JUDGMENT

Provided that the Court does not dismiss and deny defendants' motion on the proofs submitted,

plaintiff, upon his affidavit attached, moves the Court for an order postponing and continuing the hearing of the defendants' Motion for Summary Judgment until such time as plaintiff shall have taken the deposition of the persons hereafter referred to.

The persons whose depositions plaintiff desires to take, the issues regarding which plaintiff desires to examine each of such persons, and the facts which plaintiff seeks to establish by such examination, are as follows:

Issues and Facts

Plaintiff desires to examine each as to negotiations, conferences, discussions, etc., had by such persons with personnel of Pacific Lighting Group [180] and defendants herein regarding gas service by P. G. & E. to defendants. Plaintiff seeks to establish that the P. G. & E. and the Pacific Lighting Group did commence such negotiations, conferences, and/or discussions after plaintiff's conferences with Southern California Gas Company personnel in the Fall of 1952.

Names

1. James Black—P. G. & E.
2. Norman Sutherland—P. G. & E.
3. J. H. Gumz—P. G. & E.
4. Executive Engineer—P. G. & E.
5. Vice-President, Gas Operations—P. G. & E.
6. Grove Lawrence—Pacific Lighting Gas Supply Co.

7. W. M. Jacobs—Pacific Lighting Gas Supply Co.
8. Frank Foster—Southern California Gas Co.
9. Robert B. Coons—Southern California Gas Co.
10. George C. Ellis—Southern California Gas Co.

Dated: March 11th, 1958.

/s/ W. D. MacKAY,
In Pro. Per.

Notice of Motion

To the Defendants, and to Their Attorneys:

Please Take Notice that the above motion will be brought on for hearing before the above-entitled court in the courtroom of the Honorable Harry C. Westover, United States Courthouse Building, 312 North Spring Street, Los Angeles, California, on the 17th day of March, 1958, at 10:00 o'clock a.m. or as soon thereafter as the parties can be heard.

/s/ W. D. MacKAY,
In Pro. Per.

[Endorsed]: Filed March 11, 1958. [181]

[Title of District Court and Cause.]

MINUTES OF THE COURT, MARCH 17, 1958

Present: Hon. Harry C. Westover, District Judge.
Plaintiff W. D. MacKay present in pro.
per.

Counsel for Defendant American Potash
& Chem. Co.: Martin E. Whelan, Jr.

Counsel for Defendant West End Chemical:
Frederick S. Waiss.

Proceedings:

For (1) hearing motion of plaintiff (filed 3/11/58)
for continuance of hearing motion for summary
judgment;

(2) Hearing motion of plaintiff (filed 3/11/58)
to strike portions of affidavits of J. H. Gumz, Robert
D. Coons, W. M. Jacobs, George C. Ellis, and
Wm. F. Spaulding;

(3) Hearing motion of defendant American
Potash & Chemical (filed 12/6/57) to dismiss;

(4) Hearing motion of defendants (filed 1/3/58)
for summary judgment;

(5) Further pretrial.

Court makes a statement to plaintiff appearing
in pro. per.

Plaintiff makes a statement re motion (1) for
continuance of hearing motion for summary judgment.

Further statements are made by Court and plaintiff.

Court grants defendants' motion (4) for summary judgment.

Counsel for defendants to prepare findings of fact, conclusions of law, and judgment accordingly.

JOHN A. CHILDRESS,

Clerk;

By /s/ MARY O. SMITH,

Deputy Clerk. [182]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The motions of defendants American Potash & Chemical Co., Inc., and Stauffer Chemical Company for a summary judgment herein came on regularly for hearing on January 13, 1958, at 2:00 o'clock p.m., in the Courtroom of the Honorable Harry C. Westover, at which time, on plaintiff's motion the hearing thereon was continued over until January 27, 1958, at 2:00 o'clock p.m. in the Courtroom of the Honorable Harry C. Westover. On January 27, 1958, at 2:00 o'clock p.m., the said motions again came on regularly for hearing in the Courtroom of the Honorable Harry C. Westover, at which time, on plaintiff's motion, the hearing thereon was again continued over [183] until February 17, 1958, at 10:00 o'clock a.m., in the Courtroom of the aforesaid Honorable Judge. On February 17, 1958, at 10:00 o'clock a.m., the said motions again came on

regularly for hearing in the Courtroom of the Honorable Harry C. Westover, at which time, on plaintiff's motion, the hearing thereon was again continued over until March 17, 1958, at 10:00 o'clock a.m., in the aforesaid Courtroom of the aforesaid Honorable Judge. Said motions came on regularly for hearing on March 17, 1958, at 10:00 o'clock a.m., in the Courtroom of the Honorable Harry C. Westover, the plaintiff appearing, as on each of the prior dates above mentioned, in propria persona, and the defendant American Potash & Chemical Co., Inc., appearing, as on each of the prior dates mentioned, by its attorneys, Gibson, Dunn & Crutcher and Martin E. Whelan, Jr., and the defendant Stauffer Chemical Company appearing, as on each of the prior dates mentioned above, by its attorney, Fredrik S. Waiss. The Court, having considered all points and authorities, affidavits, written interrogatories and answers thereto, and other papers on file, and relied upon by said motions, and having considered all arguments, now makes the following Findings of Fact and Conclusions of Law, with respect to said motions for summary judgment.

Findings of Fact

1. There is no genuine issue of fact with respect to the allegations contained in the First Cause of Action, the Second Cause of Action and the Third Cause of Action of plaintiff's complaint herein and more particularly in Paragraphs IV and V of the First Cause of Action and in those same paragraphs

as incorporated by reference in Paragraph I of both the Second Cause of Action and the Third Cause of Action to the effect that the contract or contracts entered into by defendants American Potash & Chemical Co., Inc., and Stauffer Chemical Company as the successor in interest pursuant to merger of all the assets and [184] liabilities of defendant West End Chemical Company (erroneously sued herein as West End Chemical Co., Inc.), respectively, with Pacific Gas & Electric Company were either of them made or entered into as a result of any services or efforts performed by plaintiff, or that the procuring of natural gas service at the plants of defendants, or of either of them, in the area of Trona, California, was in any way the result of or connected with any services or efforts performed by the plaintiff.

2. There is no genuine issue of any material fact as to either the First Cause of Action or the Second Cause of Action or the Third Cause of Action of plaintiff's complaint herein, in that it without contradiction appears from the aforesaid papers on file herein, including affidavits filed in support of the motions for summary judgment as follows:

(a) No services by or efforts of the plaintiff, if any services were performed or efforts made by the plaintiff, contributed to or were in any way connected with the entering into of a contract or contracts by the defendants (as hereinabove delineated in Finding of Fact No. 1) or either of them with Pacific Gas & Electric Company for the furnishing

of natural gas service to the plants of defendants or either of them in the area in and around Trona, California;

(b) No services by or efforts of the plaintiff, if any services were performed or efforts made by the plaintiff, contributed to or were in any way connected with the furnishing of natural gas service by the Pacific Gas & Electric Company to said defendants' plants in or about the area of Trona, California, or to either of said plants.

3. Defendants (as hereinabove delineated in Finding of Fact No. 1) are entitled to a declaration that plaintiff is not entitled to any compensation or relief of any nature whatsoever by reason of the facts alleged in the Second Cause of Action of [185] plaintiff's complaint herein.

4. There is no amendment which plaintiff can make to his complaint herein or to any count therein attempted to be stated whereby he will be able to state a claim entitling him to relief which would not have to rely upon facts contrary to the Findings of Fact hereinabove set forth.

Conclusions of Law

1. If there was ever any agreement between the plaintiff and the defendants (as hereinabove delineated in Finding of Fact No. 1) or either of them, as alleged in plaintiff's complaint herein, plaintiff is nonetheless not entitled to any compensation or relief from either of the moving defendants.

2. There is no genuine issue as to any material fact which would raise a triable issue concerning any of the matters heretofore set out in Conclusions of Law No. 1.

3. There is no amendment which plaintiff can make to his complaint herein or to any count therein attempted to be stated whereby he will be able to state a claim entitling him to relief which would not have to rely upon facts contrary to the Findings of Fact hereinabove set forth.

4. Judgment should be rendered for defendants (as hereinabove delineated in Finding of Fact No. 1) and each of them with costs awarded to said defendants and each of them.

Dated: April 8, 1958.

/s/ HARRY C. WESTOVER,
Judge, United States District Court, Southern District of California, Central Division.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 9, 1958. [186]

In the United States District Court, Southern
District of California, Central Division

No. 933-57—HW

W. D. MACKAY,

Plaintiff,

vs.

AMERICAN POTASH & CHEMICAL CO., INC.,
a Corporation, Et Al.,

Defendants.

SUMMARY JUDGMENT

Pursuant to the Findings of Fact and the Conclusions of Law signed by this Court, on the date hereinbelow entered on this Judgment,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That plaintiff take nothing by reason of his complaint herein as to defendant American Potash & Chemical Co., Inc., a corporation, and that said defendant recover from the plaintiff its costs of suit herein in the sum of \$.

2. That plaintiff recover nothing on his complaint herein as to defendant Stauffer Chemical Company as the successor in interest pursuant to merger of all the assets and liabilities [188] of defendant West End Chemical Company (erroneously sued herein as West End Chemical Co., Inc.) and that said defendant Stauffer Chemical Company

recover from plaintiff its costs of suit herein in the sum of \$.

Dated: April 8th, 1958.

/s/ HARRY C. WESTOVER,
Judge United States District Court, Southern District of California, Central Division.

Affidavit of service by mail attached.

[Endorsed]: Filed and entered April 9, [189] 1958.

[Title of District Court and Cause.]

NOTICE OF ENTRY

Mr. W. D. MacKay,
111 West 5th Street,
Los Angeles 13, Calif.

Gibson, Dunn & Crutcher, Esqs.,
634 South Spring St.,
Los Angeles 14, Calif.

Vincent H. O'Donnell & Fredrik S. Waiss, Esqs.,
1820 Mills Tower,
San Francisco 4, Calif.

Re: MacKay vs. American Potash & Chemical Co., Inc., et al., No. 933-57—HW.

You are hereby notified that summary judgment in the above-entitled case has been entered this day in the docket.

Dated: April 9, 1958.

CLERK,
U. S. District Court,

By C. A. SIMMONS,
Deputy Clerk. [191]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiff, W. D. MacKay, in propria persona, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order and Final Judgment docketed and entered in this action on the 9th day of April, 1958.

Dated: May 7th, 1958.

/s/ W. D. MACKAY,
In Propria Persona.

Affidavit of service by mail attached.

[Endorsed]: Filed May 7, 1958. [192]

In the United States District Court, Southern
District of California, Central Division

No. 933-57—HW Civil

W. D. MACKAY,

Plaintiff,

vs.

AMERICAN POTASH & CHEMICAL CO., Et
Al.,

Defendants.

Honorable Harry C. Westover, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

W. D. MACKAY,

In Propria Persona, and

G. H. GOTTLIEB, ESQ.

For the Defendant American Potash and Chem-
ical Company:

GIBSON, DUNN & CRUTCHER; by
MARTIN E. WHELAN, JR., ESQ.

For Stauffer Chemical Company:

FREDRIK S. WAISS, ESQ.

* * *

January 27, 1958—2:00 P.M.

The Clerk: No. 933-57—HW Civil, W. D. Mac-
Kay vs. American Potash and Chemical Company.

Mr. Whelan: Ready for the American Potash.

The Court: Is Mr. MacKay here?

Mr. MacKay: Yes.

The Court: I understand your counsel is going to withdraw from the case or has withdrawn and that you are either going to appear in pro. per. or you are going to have counsel.

Mr. MacKay: I will have counsel, but now we are asking for an extension.

The Court: How much do you want?

Mr. MacKay: In the petition we asked for 45 days.

The Court: I will deny that without going any further. I might give you a week or two. Let me see the log book in this case, will you? When this case came up the first time I read the pleadings and I asked how you were going to avoid the question of the statute of limitations. There has been a defense raised of the statute of limitations, statute of frauds, and also that you were not licensed to do this sort of work. Here are three very special defenses, and if any one of them is good you can't recover. This is a very technical matter. You are going to have to have an attorney. [9*] From the complaint itself it appears that the statute has run, but I don't know. I will give you a reasonable time to get an attorney, but not 45 days.

Mr. MacKay: It is going to require some little time to explore this thoroughly with the attorney I decide on.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: You should have explored this before you filed the suit.

Mr. MacKay: There were peculiar circumstances here, your Honor. We have had three attorneys involved in this situation already, but two were employed for a specific purpose with no intent of continuing with the case.

The Court: You better get somebody that is going to continue with this case. I will continue the matter until February 17th.

Mr. Whelan: Your Honor, there is one other thing. There have been some interrogatories on file here. I have no objection to your Honor extending the time to answer them. However, I would like them in several days before the 17th, if an answer is going to be made to them. They have been on file since December 20th.

The Court: Has the plaintiff refused or failed to answer the interrogatories?

Mr. Whelan: I wouldn't want to go so far as to say refused to answer. We had previously advised Mr. Gottlieb [10] we would furnish him with a copy of the deposition taken before this action. I was on vacation following Christmas and accordingly he didn't receive it. I furnished it to him at the last hearing and told him if it was all right with the court, we would grant an extension of time up through last Thursday, I believe.

The Court: The only thing I am interested in now is this question of the statute of limitations, statute of frauds, and also the question as to whether or not he had any license.

Mr. Whelan: There is a motion for summary judgment on file, your Honor, also, which we feel, at least, is worthy of consideration.

The Court: If there are any interrogatories along that line, the plaintiff should answer them.

Mr. Whelan: Your Honor, the motion for summary judgment has been set along with the other matters for the last two or three settings.

The Court: That matter will be continued to February 17th.

Now, Mr. MacKay, if they ask you any questions, you are supposed to answer them.

Mr. MacKay: If it would be of any advantage to either the court or the defendant, we would prepare the interrogatories and have them ready within 10 days, but we [11] prefer to let the whole thing go, whichever is your pleasure.

The Court: You be back here on the 17th at 10:00 o'clock in the morning. I want you to get an attorney and don't come back and say that you haven't got an attorney.

Mr. MacKay: No, we will be here with counsel, your Honor.

Mr. Whelan: Thank you, your Honor.

(Whereupon, an adjournment was taken to February 17, 1958.) [12]

February 17, 1958—10:00 A.M.

The Clerk: No. 933-57—HW Civil, W. D. MacKay vs. American Potash and Chemical Company, et al., for hearing motion of defendant American

Potash and Chemical Company to dismiss, hearing motion of defendants for summary judgment, and further pretrial.

Mr. Whelan: Ready.

Mr. Waiss: Ready.

The Court: Mr. MacKay, when you were here before I ordered you to get an attorney to handle this litigation. You came in last week with a request for a continuance. I am satisfied in my own mind that the cause of action has run on this case, that you are barred by the statute of limitations, and if you go out and get an attorney, the only thing you are getting an attorney for is to help prosecute an appeal from the decision of this court. I think I would be doing you a favor if I dismissed this case today and not cause you to come back here any more.

Mr. MacKay: Of course, you have the authority, I presume, to take what action you see fit, but I am perfectly willing to take the chance and whatever expense I will be put to in prosecuting this case through proper counsel. However, I will say that, unfortunately, the attorney that I hoped to complete an arrangement with was taken ill and it was [13] through absolutely no fault of mine. We had ample time to complete the arrangements, but due to the fact of his illness, as I said, he hasn't had the chance to go over the matter with me. In fact, he hasn't had time to examine the record that is being built up in this proceeding.

As to the other matters you refer to, when the entire matter is spread before you by proper coun-

sel, of course, I will abide by any decision made, and whatever action further I take will depend on the circumstances, but until I have the opportunity of being represented by competent counsel, I think I am entitled to a reasonable further extension. The delays, as you well know, as the record will indicate in this proceeding, have been caused entirely by the defendants in this action. They haven't brought up ordinary problems. They have brought up very complicated legal situations here that will require scrutiny by competent legal counsel. The record discloses from my standpoint when this action was brought, there was nothing to it more or less than a clear-cut simple business transaction. Now they have twisted it through their maneuvers and have made it a very complicated matter and from my standpoint the situation is entirely different now than it was, and I will be a little more careful in the type of attorney I finally choose to represent me than I have been up to this point. Taking all the facts into consideration [14] which are outlined in the petition, which I filed for this next extension, I think I am entitled to a reasonable further extension, by which time I am satisfied we will be here represented by competent counsel and we will proceed from there.

The Court: Mr. MacKay, I don't agree with you that this delay has been caused by the attorneys for the defendant. The attorneys have raised legal defenses which I think are true.

The first time you came in here I asked you how

you were going to get around the statute of limitations. They have raised a number of technical defenses, that is, you didn't have a license, and so forth and so on. I doubt very much if you can establish your cause of action.

However, I find that wherever we have a case in which one of the parties is appearing in pro. per., that immeasurably adds to the work of the court, because the court has to be your attorney to some extent and has to look after you to see that you are not penalized in any way.

Mr. MacKay: I understand that, but we did take into consideration the fact that I have had advice of counsel, of three attorneys, in this proceedings.

The Court: And probably three attorneys have told you you can't recover and you won't take their advice.

Mr. MacKay. No. I don't agree to that, because that isn't true. I am employing an attorney, as I told you [15] before. The three attorneys, with the possible exception of Mr. Gottlieb, and his was more or less contingent, were on a specific basis. They were paid for doing a certain job. There was no intent of prosecuting the action to finality. I appreciate the next attorney I appear with will be handling this case. I don't hold myself out as an attorney. I am not an attorney. My work is in an entirely different line. But I have had legal advice all the way through this proceeding right from the start, and if the technicalities you refer to and that have been brought up by the defendant's counsel

will stand up, well, then, I have been very badly advised by the legal talent that I paid for.

Mr. Whelan: I would like to say that Mr. Waiss and I both oppose any further continuance. The motion to dismiss has been scheduled at least four or five times and it has been put over. It was due to Mr. Gottlieb and not Mr. Waiss or myself.

The Court: That is probably true, but, however, although I am rather doubtful if Mr. MacKay can establish a cause of action here, the Circuit has told me on several occasions I ought to give him the opportunity to try.

Mr. Whelan: May I mention one more thing? Mr. MacKay claims we are raising a technical defense, but I would like to call your attention to the fact that the motion for summary judgment and Mr. MacKay's answers to that establish [16] he has no cause of action. That is hardly technical.

The Court: But if he wants to spend his money going out and hiring competent legal counsel and they come up and try to establish the claim for action, I think he has a right to do it.

Mr. Whelan: I suggest it should take more than this affidavit to establish his diligence.

The Court: I suppose I could deny the motion and dismiss the case. I think probably I would be sustained. But I think I ought to give him one more chance.

How much more time will it take, Mr. MacKay?

Mr. MacKay: Well, I asked for 45 days, but I will have to be satisfied with what you give me. This matter has reached a stage where it has got to

be taken care of and I am just as anxious to take care of this as you are. If they would go ahead and try this case on its merits, I would be tickled pink to go ahead tomorrow, but that is not possible under the present conditions, and I therefore think I am entitled to at least, if not the full 45 days, at least 30 days if possible, and by that time I will agree to be here with competent counsel.

The Court: The record shows, Mr. MacKay, that you came into court 10/7/57, on pretrial. It was then continued to 11/18. That was practically six weeks. Then on the 18th you came in and it was continued to 12/16, another [17] month. Then on 12/16 we have a motion to dismiss and on 12/16 the matter was continued to 1/13. On 1/13 it was continued to 1/27. On 1/27 continued to 2/17. So we have had continuances continuously from 10/7 to 2/17. That is about four months.

Mr. MacKay: Well, part of those were made by the change in counsel, but the greater portion are due to tactics of the defendant's counsel.

The Court: Mr. MacKay, the tactics of the defendants have been legal in every way.

Mr. MacKay: I perfectly understand that point. I am not saying that they are operating outside of their rights, but they are creating complications that have forced me to change my plans and approach to this matter.

The Court: Well, you have to change your plans and approach because you don't understand the rules of law.

Mr. MacKay: I paid quite a lot of money in this

already and I am prepared to pay something additional. I am willing to do that and take that chance up to a point.

The Court: I am going to continue this matter to March 17th and there will not be any more continuances. If you don't show up with counsel by then, I have got this motion to dismiss to decide. I will continue that to March 17th and on March 17th I am either going to grant the motion or deny it so between now and March 17th, you get any competent [18] counsel you want and come back and file your points and authorities so that I will have a chance to look at them.

Mr. MacKay: Thank you.

Mr. Whelan: May I ask that Mr. MacKay be specifically instructed that his attorney should be prepared to argue the motion on that day and not simply come in and ask for a further continuance.

The Court: Mr. MacKay, tell your attorney there will be no more continuances. I am going to rule on that day on the motion to dismiss.

Mr. Waiss: And also the motion for summary judgment.

The Court: Yes.

Mr. Whelan: Mr. Waiss has to come down from San Francisco.

The Court: I understand and it is too bad you have got to come, but you have competent counsel here anyhow, you know.

Mr. Waiss: He is representing primarily another defendant and I would be remiss if I neglected my own client.

The Court: I am sorry to make you make the trip, but it is nice in Southern California. I don't know what the situation is in San Francisco.

Mr. Waiss: It is a pleasure to come down here, although I cannot feel there are really very many issues to [19] be disposed of in this matter.

The Court: We will dispose of the matter on the 17th at 10:00 o'clock in the morning. [20]

March 17, 1958—10:00 A.M.

The Clerk: No. 7, 933-37—HW Civil, W. D. MacKay vs. American Potash and Chemical Company, et al., hearing motion of plaintiff for continuance of hearing motion for summary judgment; hearing motion of plaintiff to strike portions of affidavits of J. H. Gumz, Robert D. Coons, W. M. Jacobs, George C. Ellis, and William F. Spaulding; hearing motion of defendant American Potash & Chemical Company to dismiss; hearing motion of defendants for summary judgment; and further pretrial.

Mr. Whelan: Ready, your Honor.

Mr. Waiss: Ready.

Mr. MacKay: I am here, your Honor.

The Court: Mr. MacKay, will you come forward, please?

Mr. MacKay: Yes, your Honor.

The Court: Mr. MacKay, this matter has been pending in this court since August 2, 1957. On 12/6/57, we had a motion to dismiss. Then on January 23rd we had a motion for summary judgment.

On January 27th there was a substitution of attorneys, and the matter was continued to March 17, 1958.

On March 11th there was a motion made for continuance, and the last time you were here I continued it for the purpose of allowing you to get an attorney. [21]

Now, Mr. MacKay, I have another motion for a continuance.

Mr. MacKay: Well, your Honor, assuming, of course, that you have studied and read the documents that have been filed in reply to the motions of the defendants in this action, I am sure you appreciate the fact that I have employed legal counsel.

The Court: Mr. MacKay, I am satisfied that the papers that have been filed have been prepared by an attorney. I don't think you could have prepared these papers yourself. But the attorney didn't sign his name. You signed your name to these papers.

Not only that, but we have this motion, and we have an attorney who comes down here each time from San Francisco. You did come down from San Francisco?

Mr. Waiss: Yes, your Honor.

Mr. MacKay: It is my understanding, on advice of counsel, that I have the privilege of conducting my negotiations with counsel on a confidential basis between client and counsel and we are taking advantage of that particular situation. As I understand the matter, and on my attorney's advice, the matters before the court at this time are strictly of

a legal nature, and I am perfectly willing that on the documents that have been filed and are now before the court that you pass on the motions that are made by the defendants [22] and now pending before the court.

If, however, you do not agree with the position that I have taken in reply to all of the legal points brought on matters before the court, then I would like a separate ruling on my motion for a further extension for the reasons outlined in the motion which are primarily to enable me to take additional depositions that are absolutely necessary for me to properly defend myself in this action through the nature of the affidavits that are filed by defendants in this action.

The Court: Mr. MacKay, I am going to do one of two things this morning. I am either going to dismiss this action or I am going to give you an extension, but require you to reimburse the defendant for the costs. He has made two trips down here now from San Francisco. I don't know just what attorneys charge nowadays. I suppose they charge around \$200 a day.

Your motions have caused at least two days' visits down here, so if you want a continuance, I will give you a continuance for 30 days provided you pay to the defendants the sum of \$500. Otherwise, the case will be dismissed.

Mr. MacKay: Am I to understand by that you are not ruling, making a definite ruling upon the motions filed that are pending?

The Court: I am dismissing the case because it

appears [23] your case is barred by the statute of limitations, and I don't think there is anything you can do that is going to rectify that.

I think I would have done you a favor if I had dismissed this case several months ago, and I think I am doing you a favor now in dismissing it because you will be precluded from spending additional time and money on a case that you cannot establish. You have got a bad case here. You might have had a good case if you had proceeded promptly, but you didn't proceed promptly.

Mr. MacKay: That, of course, is your prerogative. I have been acting on the advice of counsel, and the position taken by counsel—

The Court: I don't like counsel to practice in this court sub rosa. If counsel wants to come into this court, I will be glad to hear counsel. I don't like the advice of counsel to be given, not knowing who the counsel is.

I will do one of two things, as I said. I will give you a 30-day continuance, provided you reimburse the defendant for the cost of coming down here these two days, or I will dismiss the case.

Mr. MacKay: I wouldn't undertake to incur that obligation. I would prefer to spend that money on an appeal, if that is your ruling. Am I to understand you will not make a special ruling on the motion for extension of time? [24]

The Court: I have a motion for summary judgment. The motion is granted.

Will you prepare the findings of fact and judgment?

Mr. Whelan: They are prepared in a proposed form.

The Court: I am sorry, but you prepare new findings and a new judgment and serve a copy upon Mr. MacKay so that he can know what time to appeal.

Mr. MacKay, you don't know anything about legal procedure.

Mr. MacKay: I am paying very good money for competent counsel.

The Court: An appeal is a very technical thing. You have got to give counsel notice, file your record within a certain specified time, and——

Mr. MacKay: I understand all that.

The Court: If you don't do that, you will be in the same position in the Appellate Court as you are here.

Mr. MacKay: I understand that.

Mr. Whelan: Both the motion to dismiss and the motion for summary judgment are granted?

The Court: No. The motion for summary judgment with findings of fact and conclusions of law. I have granted that motion and you prepare the findings of fact and conclusions of law.

Mr. Whelan: Thank you very much.

[Endorsed]: Filed August 4, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals, for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 195, inclusive, containing the original:

Petition for Removal to the United States District Court with copy Complaint attached, etc.

Notice of Petition and filing Bond for Removal.

Answer of American Potash & Chemical Co.

Answer of Stauffer Chemical Co.

Minute Order of 10/7/57.

Minute Order of 11/18/57.

Motion and Notice of Motion to Dismiss Action, etc.

Points and Authorities in opposition to Motion to Dismiss.

Substitution of Attorneys, filed 12/16/57.

Defendants' Interrogatories.

Minute Order 12/16/57.

Affidavit of Service by mail filed 1/3/58.

Memorandum of points and authorities in support of defendants' motion for summary judgment.

Affidavit of J. H. Gumz in support of motion for summary judgment.

Affidavit of W. M. Jacobs in support of motion for summary judgment.

Affidavit of George C. Ellis in support of motion for summary judgment.

Affidavit of Robert B. Coons in support of motion for summary judgment.

Affidavit of William F. Spalding in support of motion for summary judgment.

Motion for summary judgment, etc.

Proposed form of Findings of Fact and Conclusions of Law

Proposed form of Judgment.

Answering points and authorities in support of motion to dismiss action.

Substitution of Attorneys, filed 1/27/58.

Minute Order 1/13/58.

Affidavit of service by mail filed 1/27/58.

Order extending time.

Affidavit of W. D. MacKay in support of motion for continuance.

Minute Order 1/27/58.

Affidavit of W. D. MacKay in support of motion for continuance, filed 2/17/58.

Plaintiff's answers to defendants' interrogatories

Affidavit of service by mail filed 2/17/58.

Minute Order 2/17/58.

Reply to Defendants' Motion for Summary Judgment.

Points and authorities in opposition to Motion to Dismiss.

Plaintiff's Points and authorities in opposition to motion for summary judgment.

Affidavit of W. D. MacKay in opposition to motion for summary judgment.

Points and authorities in support of motion to strike affidavits.

Motion to strike portions of affidavits of J. H. Gumz, et al.

Motion for continuance of hearing of motion for summary judgment.

Minute Order 3/17/58.

Findings of Fact, Conclusions of Law.

Summary Judgment.

Notice of Appeal.

Designation of contents of Record on Appeal.

B. One volume of Reporter's Official Transcript of Proceedings had On:

Nov. 18, 1957; Dec. 16, 1957; Jan. 27, 1958; Mar. 17, 1958, and Feb. 17, 1958.

I further certify that my fee amounting to \$2.00 for preparing the foregoing record has been paid by appellant.

Dated: August 5, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16135. United States Court of Appeals for the Ninth Circuit. W. D. MacKay, Appellant, vs. American Potash & Chemical Co. Inc., a Corporation, and Stauffer Chemical Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: August 5, 1958.

Docketed: August 12, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals for the Ninth
Circuit

Undocketed

W. D. MacKAY,

Appellant,

vs.

AMERICAN POTASH & CHEMICAL CO., INC.,
et al.,

Appellees.

STATEMENT OF POINTS ON APPEAL

Now Comes the appellant, W. D. MacKay, in propria persona, and makes the following Statement of Points on Appeal:

1. The Court Below Erred in Granting a Summary Judgment.

A. The Court Erred in Failing to Strike Material Portions of Affidavits in Support of the Motion for Summary Judgment.

B. The Court Erred in Refusing to Grant a Continuance for Further Discovery Procedures.

C. The Court Erred in Law as to the Propriety of a Summary Judgment Under the Facts in the Record.

D. The Findings of Fact and Conclusions of Law Were Contrary to the Few Facts Developed Below.

E. Substantial Material Issues of Fact Were Controverted and Existed and a Summary Judgment Was Improper.

Respectfully Submitted,

/s/ W. D. MacKAY,
In Propria Persona.

Affidavit of service by mail attached.

[Endorsed]: Filed September 8, 1958.